92-1848

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

WHITWORTH BROTHERS STORAGE CO.,
Petitioner,

vs.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. DOES THE RECOGNIZED FEDERAL COMMON LAW ACTION FOR RESTITUTION OF AN EMPLOYER'S POST-ERISA MISTAKEN PENSION CONTRIBUTION ALSO EXTEND TO SUCH PRE-ERISA CONTRIBUTIONS? IN DETERMINING THAT QUESTION, IN THE FACE OF A CONFLICT AMONG SEVEN CIRCUIT COURTS AND THIS COURT'S HOLDING IN FRANKLIN v. GWINETT COUNTY PUBLIC SCHOOLS, 112 S.CT. 1028 (1992), SHOULD ERISA PREEMPTION BE USED AS A BASIS TO DENY ANY REMEDY OF RESTITUTION FOR UNJUST ENRICHMENT UNDER FEDERAL OR STATE LAW?

2. IN A FEDERAL COMMON LAW ACTION FOR RESTITUTION OF AN EMPLOYER'S POST-ERISA MISTAKENLY MADE PENSION CONTRIBUTIONS, DOES THE DENIAL OF INTEREST CONSTITUTE THE DENIAL OF A FULL REMEDY FOR THE RESTITUTION RIGHT? DOES THE DENIAL CONFLICT WITH THIS COURT'S DECISIONS IN FRANKLIN V. GWINETT COUNTY PUBLIC SCHOOLS, 112 S.Ct. 1028 (1992) AND UNITED STATES V. TEXAS, 113 S.CT. 1631 (APRIL 1993), ESPECIALLY WHERE ERISA DOES NOT SPEAK DIRECTLY NOR ABROGATES THE COMMON LAW REMEDY OF PREJUDGMENT INTEREST IN SUCH AN INSTANCE?

3. WHERE EXHAUSTION OF ADMINISTRATIVE REMEDIES THROUGH PENSION FUND TRUSTEES WOULD BE OBVIOUSLY FUTILE AND INADEQUATE, THE EMPLOYER'S REQUEST HAVING JUST BEEN ARBITRARILY AND CAPRICIOUSLY DENIED IN A PARALLEL SITUATION BETWEEN THE SAME PARTIES, ARE THE TRUSTEES ENTITLED TO SUMMARY JUDGMENT FOR THE EMPLOYER'S FAILURE TO EXHAUST SUCH A FUTILITY?

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EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
Respondents

PETITION FOR WRIT OF CERTIORARI

Petitioner, Whitworth Brothers Storage Co. (herein "Whitworth Bros.") respectfully prays that this Court grant this Petition for a Writ of Certiorari to review portions of a judgment of the United States Court of Appeals for the Sixth Circuit entered on January 11, 1993.

On review of the district court's entry of summary judgment, the Court of Appeals affirmed in part and reversed in part, and limited the scope of Petitioner's federal common law action for recovery of mistaken pension contributions.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 982 F.2d 1006 (6th Cir. 1993) and is herein referred to as "Whitworth II." That Opinion, the entry denying the Petition for Rehearing, and the District Court's unreported Opinion are reproduced in the Appendix to this Petition, pages 2a to 83a. An earlier opinion in this case was reported at 794 F.2d 221 (6th Cir.), cert. denied, 479 U.S. 1007 (1986) and is referred to herein as "Whitworth I".

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 11, 1993. The Court of Appeals denied Whitworth Bros.' timely petition for rehearing on February 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The full text of the statutes involved in this case are set forth in the Appendix pages 83a-84a. These statutes are part of the Employee Retirement and Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 et seq.:

29 U.S.C. § 1103(c)(1)
29 U.S.C. § 1103(c)(2)(A)(ii)
29 U.S.C. § 1144(a)
29 U.S.C. § 1144(b)(1)
29 U.S.C. § 1144(d)

STATEMENT OF THE CASE

William and Ernest Whitworth were co-owners, shareholders, officers, and employees of Petitioner, Whitworth Brothers Storage Co. ("Whitworth Bros."),[1] a family-operated business begun by their father. From 1955-1980 for William, and from 1955 to 1981 for Ernest, Whitworth Bros. made employer contributions to Central States, Southeast and Southwest Areas Pension Fund (herein "Central States"). Central States was originally one of the Taft-Hartley Funds and is a multiemployer employee pension benefit plan under ERISA. Since Whitworth Bros. began making contributions to Central States, Whitworth Bros. mistakenly believed that it was required to make

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[1]There are no subsidiary or parent corporations.

pension contributions pursuant to the terms of a collective bargaining agreement. Had William and Ernest been employees and not employee-owners they would have been entitled to a pension from their contributions.

William Whitworth sought to retire in 1979-1980 and requested pension benefits from Central States. Central States ultimately denied his request for a pension on the basis that William Whitworth was an owner and not an employee under ERISA.

William Whitworth retired in March, 1980. After that time, Whitworth Bros. made contributions only on behalf of Ernest Whitworth and no other employee. In mid, 1980, he had not received a pension and was asked whether he had the right to hire and fire while an employee

with Whitworth Bros. In November, 1980, Whitworth Bros. demanded that Central States either pay William Whitworth a pension or refund his pension contributions.

After a second demand by Whitworth Bros. and more correspondence, eight months later, on July 23, 1981, Central States acted. They denied a refund of contributions on behalf of William Whitworth from 1964 to November, 1979, totalling $7,506;[2] and they gave Whitworth Bros.'s account a $384.00 credit (from November, 1979 through March, 1980)

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[2]Central States based its determinations on its one-year refund policy, recently amended in view of the Multi-Employer Pension Plan Amendments Act of 1980; but their policy was adopted without any actuarial data or studies. R.56 [Whitworth Bros. Opposition to Central States' Motion for Summary Judgment, Response to Amended Interrogatory No. 9].

against future bills that weren't even owed.

Whitworth Bros. immediately ceased making pension contributions for Ernest Whitworth. Central States kept billing Whitworth Bros., threatened collection through letters and phone calls, and assessed interest and penalties. Whitworth Bros. filed suit in September, 1983 to obtain a refund and to declare the rights of the parties as to the un-owed contributions. Nonetheless, Respondent Pension Fund kept billing Whitworth Bros. through August, 1984. Appendix page 12a.

The District Court dismissed Whitworth Bros. case for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. On appeal, the Sixth Circuit reversed. Whitworth Bros. I, supra, 794 F.2d at 234-

236. The Court of Appeals held that an employer seeking a refund of mistaken contributions had no express or implied cause of action under ERISA. However, the Court held that Petitioner stated a federal common law claim for restitution, which arose under federal law. Thus, the Complaint was within the district court's subject matter jurisdiction under 28 U.S.C. § 1331.

On remand, Central States filed a Motion for Summary Judgment on the basis of a one-year employer refund policy in the Trust Agreement. Whitworth Bros. opposed summary judgment and supported its opposition with Central States' answers to interrogatories, stating that there were no studies or actuarial data of financial impact on Central States when the refund policy was adopted in December, 1980

retroactive to September, 1980. The district court concluded that the one-year refund limitation was reasonable because the Central States said it was reasonable. The one year refund policy was the basis for granting summary judgment on Whitworth Bros. claims for a refund of post-ERISA and pre-ERISA contributions. On Count III, whether Whitworth Bros. owed disputed contributions from August, 1981 to 1983 and interest, the District Court held that Whitworth Bros. did not owe contributions to the Pension Fund and entered judgment on Count III in Petitioner's favor.[3]

On appeal, the Sixth Circuit affirmed in part and reversed in part. Whitworth II, supra, 982 F.2d 1006, Appendix pages 63a-65a. As to post-ERISA contributions,

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[3]Central States did not file a cross-appeal on the District Court's determination in Count III.

the Court reversed the district court's conclusion that a one-year refund policy was reasonable. The Court held that a refund policy was arbitrary and capricious and inconsistent with principles of equity unless it was supported by actuarial data or financial data and it was necessary for the protection of the Fund, or there was some other compelling reason. The Court remanded for an evidentiary hearing on the reasonableness of the policy. Appendix pages 26a-56a.

The Sixth Circuit in Whitworth II held that federal common law restitution would only be available for the post-ERISA contributions of William Whitworth and that interest was not recoverable. Whitworth II, 982 F.2d at 1019, Appendix pages 61a-63a. The Court held that pre-ERISA contributions were not recoverable

at all. Appendix pages 24a-26a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN DENYING PETITIONER ANY REMEDY TO RECOVER MISTAKEN PRE-ERISA PENSION CONTRIBUTIONS. THE SCOPE OF PETITIONER'S FEDERAL COMMON LAW REMEDY REQUIRES EXAMINATION OF THE SCOPE OF ERISA PREEMPTION, ESPECIALLY IN VIEW OF CONFLICTS AMONG SEVEN CIRCUITS OVER THE INTERPRETATION OF 29 U.S.C. § 1144(b)(1). ERISA PREEMPTION SHOULD NOT BE USED TO DENY ANY REMEDY.

In fashioning a federal common law action for restitution, the Court of Appeals ignored this Court's holding in Franklin v. Gwinett County Public Schools, __U.S.___, 112 S.Ct. 1028 (1992):

> "[W]here legal rights have been invaded, and a federal statute provides a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Bell v. Hood, 327 U.S. 678, 684 (1946). The Court explained the longstanding rule as jurisdictional, and upheld the

> exercise of the federal courts' power to award appropriate relief so long as a cause of action existed under the Constitution or laws of the United States." Id., 112 S.Ct. at 1033.

The scope of an employer's federal common law restitution remedy for pre-ERISA contributions depends upon the scope of ERISA preemption. This Court should resolve a severe conflict among the Circuits over the scope of ERISA preemption where the cause of action arises post-ERISA, but acts or omissions occur pre-ERISA. Does federal law provide the remedy (preempting state law) or does state law remain a source for the remedy?

29 U.S.C. § 1144 provides, in relevant part:

> (a) Supersedure; effective date:
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter. . .shall supersede any and all State

> laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title. This section shall take effect on January 1, 1975.
>
> (b) Construction and application
>
> (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.
>
> * * * *
>
> (d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited
>
> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law.

See Appendix page 85a.

Seven Courts of Appeals directly conflict in their interpretation of 29 U.S.C. § 1144(b)(1) and the scope of ERISA

preemption. Where a cause of action arises post-ERISA, but an "act or omission," occurs pre-ERISA (e.g., payment of mistaken contributions), it is unclear whether a uniform federal standard applies or the laws of fifty (50) states govern.

Judge Ryan summarized this conflict:

> "One view interprets the act or omission clause narrowly and treats the trustees' post-ERISA denial of a pension as the act or omission that is subject to ERISA and disregards pre-ERISA events. This has the effect of expanding ERISA preemption. The Third, Fourth, and Fifth Circuits have adopted this position. See Tanzillo v. Local 617, Int'l Bhd. of Teamsters, 769 F.2d 140, 144 (3d Cir. 1985); see also Rodriguez [v. MEBA Pension Trust, 872 F.2d 69 (4th Cir.), cert. denied, 493 U.S. 872 (1989)]; Wood [v. Marine Cooks & Steward Union, 642 F.2d 966 (5th Cir. 1981). Under this view, if the denial of benefits occurs after January 1, 1975, ERISA applies because the denial is both an "act or omission" and the accrual of the plaintiff's cause of action."

Stevens v. Employer-Teamster's Joint Council, 979 F.2d 444, 451 (6th Cir. 1992).

Three Circuits subscribe to the opposite interpretation of 29 U.S.C. § 1144(b)(1):

> "The other view interprets the act or omission clause broadly by examining the pre-ERISA events which often govern the trustees' decision. This has the effect of limiting ERISA preemption. Under this view, if the trustees' denial is based on events that occurred and plan provisions adopted before 1975, then the denial is not reviewable. The First, Second, and Ninth Circuits adopt this view. See Menhorn [v. Firestone Tire & Rubber Co., 738 F.2d 1496 (9th Cir. 1984)], see also Lamontagne v. United Wire, Metal & Mach. Pension Fund, 869 F.2d 153, 157 (2d Cir.), cert. denied, 493 U.S. 818 (1989); Quinn v. Country Club Soda Co., 639 F.2d 838, 841 (1st Cir. 1981).

Stevens, supra, 979 F.2d at 451.

A broad reading of ERISA preemption of state law for pre 1975 acts or omissions is justified on three policy grounds: 1) it furthers' Congress' intent to extend ERISA protection; 2) it has the advantage of certainty; and 3) it is more

equitable. Stevens, supra, at 451.

The narrow reading of ERISA preemption of state law for pre-1975 acts or omissions interprets the clauses "cause of action" or "acts or omissions" disjunctively because of the "or." This view is justified 1) it does not rob § 1144(b)(1) "or" of its meaning; 2) it does not apply ERISA standards retroactively.

After considering the Circuit split, the Sixth Circuit adopted the narrow preemption view in Stevens, supra.[4]

Justice White has stated that this conflict over the scope of ERISA preemption should be addressed and

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[4]Cf. Fisher v. Combustion Engineering, 976 F.2d 293, 297 & n.2 (6th Cir. Sept. 25, 1992)(Merritt, C.J.)(stating ERISA preempts without addressing what is left under federal law) with Id., at 299 (Ryan, J., dissenting)[reasoning no ERISA preemption and noting Circuit split under 29 U.S.C. § 1144(b)(1)].

resolved by this Court. McMonagle v. Northeast Women's Center, 110 S.Ct. 261, 263 (1989)[White, J., dissenting on the denial of writ of certiorari in MEBA Pension Trust v. Rodriguez, No. 89-206, 493 U.S. 872 (1989) and noting Circuit conflict.]

In Whitworth II, the Court denied any employer recovery for pre-ERISA contributions. 982 F.2d at 1012, Appendix pages 24a-26a. Whitworth II claimed it was following Crews v. Central States Southeast & Southwest Areas Pension Fund, 788 F.2d 332, 336-37 (6th Cir. 1986), but a careful reading of Crews shows that it provides no remedy at all, a position in conflict with other Courts, 29 U.S.C. § 1144(b)(1) caselaw, and with Franklin v. Gwinett County, supra.

If there is a remedy for pre-ERISA

contributions, certain factors are relevant. ERISA preemption of state law under 29 U.S.C. § 1144(a) is "deliberately expansive," and designed to "establish pension plan regulation as exclusively a federal concern." Ingersoll-Rand Co. v. McClendon, 111 S.Ct. 478, 483 (1990) (internal citation omitted). Because of this overriding preemption, federal courts have been encouraged to create federal common law remedies. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987).

The scope of ERISA preemption must also be read in tandem with 29 U.S.C. § 1144(d), which states that ERISA does not supersede other federal law. A claim for pre-ERISA benefits may be based under Section 301 of the LMRA, 29 U.S.C. § 185 Stevens, supra, 979 F.2d at 455-57 (which again presents a conflict with the

Whitworth II "no remedy" approach.)

The federal rules do not require legal theory pleading--only notice pleading of the facts. Fed.R.Civ.P. 54(c) requires that

> "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."

Thus, in the context of a federal common law remedy that preempts, to some degree, state law, what is the scope of the cause of action, and what law governs?

In addition to the Circuit conflict addressed above, the issue is one of significant import beyond this Whitworth case. For a three (3) year period alone (1980-1983), Central States totally denied 157 refund requests out of 383 applications. $1,613,446 was involved of which $696,546 was unpaid. These numbers,

in view of the great number of pension funds, and dollars, may be only a small portion of the total amounts of dollars and employers subject to the same uncertainty that could be resolved by this Court's grant of certiorari and resolution of the issues.[5]

II. A FEDERAL COMMON LAW REMEDY FOR RESTITUTION, TO BE EQUITABLE AND MEANINGFUL, SHOULD INCLUDE PREJUDGMENT INTEREST. THE COMMON LAW PRESUMPTION HAS NOT BEEN OVERRIDDEN BY CONGRESS. TO DENY INTEREST IS TO DENY A REMEDY FOR THE RIGHT OF RESTITUTION CONTRARY TO THIS COURT'S HOLDING IN FRANKLIN V. GWINETT COUNTY PUBLIC SCHOOLS, 112 U.S. 1028 (1992) AND U.S. v. TEXAS, 113 S.CT. 1631 (April 5, 1993).

Under the common law of restitution,

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[5]Information was provided by the interrogatory answers of Central States in the District Court, which Court did not permit Plaintiff to further inquire about information for years earlier than 1980.

interest is normally required.[6] In pertinent part, the Restatement of Restitution § 156 states:

> "Subject to the rules stated in § 157, a person who has a duty to pay the value of a benefit which he has received, is also under a duty to pay interest upon such value from the time he committed a breach of duty in failing to make restitution if, and only if
>
> (a) the benefit consisted of a definite sum of money, or
>
> * * * *
>
> (c) payment of interest is required to avoid injustice."
>
> (Emphasis supplied)[7]

In addressing an employer's federal common law action for restitution of

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[6]"Interest, when not stipulated by contract or authorized by statute, is allowed by the courts as damages for the detention of money. . . to which the plaintiff is entitled." United States v. Texas, 113 S.Ct. 1631, 1637 n.1 (Stevens, J., dissenting)(noting common law rule).

[7]Accord, G. Bogert, The Law of Trusts, § 863 (2d ed. 1983); G. Douthwaite, An Attorneys' Guide to Restitution § 8.1 at page 326.

mistaken contributions, the Courts of Appeals have held that prejudgment interest is per se unavailable.[8] These Courts have justified this conclusion by broadly construing the anti-inurement policy of ERISA, 29 U.S.C. § 1103(c)(1),[9]

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[8]Whitworth II, 982 F.2d at 1019 (anti-inurement policy of ERISA bars interest), Appendix pages 61a-63a; Airco Industrial Gases, Inc. v. Teamsters Health & Welfare Pension Fund, 850 F.2d 1028, 1037 (3d Cir. 1988)(same); Kwatcher v. Mass. Service Employees Pension Fund, 879 F.2d 957 (1st Cir. 1989)(same); Dumac Forestry Services, Inc. v. Int'l Broth. of Elec. Workers, 814 F.2d 79, 83 (2d Cir. 1987)(denying interest but noting general common law rule allowing it); Peckham v. Board of Trustees of Int'l Bhd. and Allied Trades Union, 724 F.2d 100, 101 (10th Cir. 1983)(deferring to proposed treasury regulation barring payment of interest).

[9]Section 403(c)(1), 29 U.S.C. § 1103(c)(1) states, in pertinent part:

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) . . . the assets of a plan shall never inure to the benefit of any

narrowly construing 29 U.S.C. § 1103(c)(2)(A)(ii), as amended in 1980, and on the policy concern that an interest award might be costly to pension funds. Appendix at pages 62a-64a.

These Courts ignored the principle stated in Franklin v. Gwinett County Public Schools, ___U.S.___, 112 S.Ct. 1028 (1992). Coupled with this Court's intervening decision in United States v. Texas, 113 S.Ct. 1631 (April 5, 1993), the Court of Appeals below has ruled contrary to this Court's precedent. Franklin, supra, held that where federal law recognizes a cause of action (in that case, an implied one), the presumption is that all "appropriate relief" is

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employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

available. Franklin, supra, 112 S.Ct. at 1033. United States v. Texas, 113 S.Ct. 1631 (April 5, 1993) addressed whether prejudgment interest was an available remedy in federal common law actions, where the United States seeks recovery of debts from a state. The State of Texas argued that the Debt Collection Act of 1982, 31 U.S.C. § 3717 abrogated the common law rule requiring the return of interest.

Where common law remedies exist, Congress does not write on a clean slate. Rather, as this Court said:

> "courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.'"

United States v. Texas, 113 S.Ct. at 1635 [quoting Astoria Federal Savings & Loan Assn v. Solimino, 501 U.S. ___, 111 S.Ct. 2166, 2168-70 (1991)].

To abrogate the common law rule,

Congress must "speak directly" to the question addressed by the common law. Statutory silence does not meet the "speak directly" standard. United States v. Texas, 113 S.Ct. at 1635.

The Texas case makes it clear that the Court of Appeals in Whitworth II, like most others, did not apply the proper analysis in a federal common law action. Whitworth II simply concluded that interest was barred by the anti-inurement policy. Appendix, pages 61a-63a. The Court did not examine common law remedies for restitution actions, or the equitable principles furthered by permitting prejudgment interest. Ironically, earlier in its opinion, the Court observed that Central States received a windfall (it did not have to pay pensions to William and Ernest Whitworth). It had been unjustly

enriched by its arbitrary and capriciously one year refund policy. Restitution is an equitable action. Appendix page 52a.

Section 403(c)(2)(A)(ii) of ERISA, 29 U.S.C. § 1103(c)(2)(A)(ii), which allows return of contributions for mistakes of fact or law, is silent as to prejudgment interest.[10] But the statutory language "mistake of fact or law" invokes the common law of restitution,[11] just as the use of trust terminology invokes the

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[10]Section 1103(c)(2)(A)(ii) states:

> "In the case of a contributions . . . (ii) made by an employer to a multiemployer plan by a mistake of fact or law . . . paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake."

[11]See Note, An Employer's Implied Cause of Action for Restitution Under Section 403 of ERISA, 54 Fordham L.Rev. 225, 244 n.133 (1985).

common law of trusts. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989). Congress expressly used classic restitution language in § 1103(c)(2)(A)(ii), presumably aware of common law restitution remedies. The statute does not "speak directly" to interest and does not bar it as part of the "return of such contribution of payment." Since the statute does not abrogate the common law, prejudgment interest should be allowed.

The per se bar on prejudgment interest has created perverse, inequitable results. There is no incentive for pension funds to return mistaken contributions and quite an incentive to delay its return. There was also an incentive for Central States to demand contributions from Whitworth Bros. that weren't owed. Employers may be

better off not participating in pension plans. Although that would frustrate ERISA's purpose of promoting pension plans, Appendix page 53a, a small employer is foolish to ever deal with a pension fund like Central States, unless the law provides expected remedies for expected rights.

Finally, since a federal common law action for restitution would fall under 29 U.S.C. § 1144(d), ERISA should not bar the recovery of interest.

Since the Courts of Appeals have not heeded the import of Franklin, supra, and United States v. Texas, supra, this Court should address the issue.

III. THE COURT OF APPEALS ERRED IN RULING ON SUMMARY JUDGMENT THAT EXHAUSTION OF ADMINISTRATIVE REMEDIES WAS REQUIRED, WHERE THE EVIDENCE IN THE RECORD, AND THE COURT'S OWN OPINION, DEMONSTRATE THAT EXHAUSTION WOULD

HAVE BEEN FUTILE AND INADEQUATE. *RESOLUTION, ON SUMMARY JUDGMENT, WAS* IMPROPER.

The Court of Appeals in Whitworth II, 982 F.2d at 1018-1019, Appendix pages 56a -62a, affirmed the dismissal of restitution claims for mistaken contributions on behalf of Ernest Whitworth because Whitworth Bros. did not pursue administrative remedies with Central States prior to filing suit in 1983. This exhaustion theory was addressed, sua sponte, by the Court of Appeals in its decision in Whitworth II. Neither party briefed the failure to exhaust administrative remedies before the trial court, nor did the trial court address that issue. The District Court stated that Whitworth Bros. made demand on behalf of William Whitworth in November, 1980 and that the refund was denied in

July, 1981. The Court noted that no demand was made on behalf of Ernest Whitworth, except the lawsuit, and that recovery would be barred under the one-year refund policy (since the last contribution was made in July, 1981). Appendix page 77a.

Although the Sixth Circuit held that exhaustion was required, the Court ignored strong evidence in the record that exhaustion would have been futile. On review of summary judgment, the Court should have remanded this issue for the trial court.

Exhaustion of administrative remedies is not required where "exhaustion would be futile or inadequate." Honig v. Doe, 484 U.S. 305, 327 (1988)(emphasis supplied) [relying upon Smith v. Robinson, 468 U.S. 992, 1014 n.17 (1984)(citing cases)]. The

Court of Appeals ignored its own precedent, such as Shawnee Coal Co. v. Andrus, 661 F.2d 1083 (6th Cir. 1981) and City of Mt. Clemens v. U.S., E.P.A., 917 F.2d 908, 914 (6th Cir. 1990). An administrative remedy would be futile where:

> "an agency has made known that its general views are contrary to those of the complainant, and has never given an inkling that it would consider a matter afresh. . . ."

Id., 917 F.2d at 915 [quoting Etelson v. Office of Personnel Management, 684 F.2d 918, 925 (D.C.Cir. 1982)].

The doctrine is not linked to judicial power, but acknowledges "prudential considerations." Mt. Clemens, supra, at 914.

In their July 23, 1981 letter denying refund of the William Whitworth contributions of $ 7,506.00, Central States wrote:

"This denial is based upon the

> applicable provisions of the Internal Revenue Code and the Employee Retirement Income Security Act of 1974 as amended by the Multiemployer Pension Plan Amendments Act of 1980, Section 310. These provisions <u>are very restrictive in terms of those conditions under which refunds are permissible</u>.
>
> We hope you understand that your request was denied because the Central States, Southeast and Southwest Areas Pension Fund must comply with the federal law which governs the operations of Pension Funds."

(Emphasis supplied.)

Whitworth Bros. immediately ceased making contributions for Ernest Whitworth.

Discovery established that <u>no studies were done</u> to support Central State's conclusion that there were "significant" or "adverse" impact if contributions were refunded, and no actuarial evidence was used.

The Sixth Circuit agreed with the reasoning of several sister Circuits that a pension fund's refund limitation is

arbitrary and capricious unless the policy is based on actuarial data, necessary to the pension fund's financial stability, and comports with equitable principles. Whitworth II, 982 F.2d at 1016-18, Appendix pages 47a-55a. The Court remanded for factfinding determination by the trial court.

After the denial of a refund for William Whitworth, it would only have been futile to make a demand for the mistaken contributions for Ernest Whitworth. Central States had already made up its mind, written its arbitrary refund policy, refused to refund mistaken contributions, and continued demanding unlawful contributions.

Under proper standard of Fed.R.Civ.P. 56, the exhaustion issue was improperly resolved by the Court of Appeals, which

was not the trier of fact. Since the Court of Appeals has improperly deviated from the summary judgment standard under Fed.R.Civ.P. 56, this Court should hear this issue.

IV. THE COURT OF APPEALS IMPROPERLY UTILIZED EVIDENCE THAT WAS NOT PART OF THE RECORD IN THE TRIAL COURT AND CENTRAL STATES SUBMITTED FOR THE FIRST TIME ON APPEAL. THE COURT OF APPEALS ACTUALLY DENIED CENTRAL STATES LEAVE TO SUBMIT SUCH EVIDENCE BUT UTILIZED IT IN ITS OPINION TO THE PREJUDICE OF PETITIONER. SUCH USE VIOLATES FED.R.APP.P. 10, THE RULES ENABLING ACT, 28 U.S.C. § 2072(b), AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

At Appendix pages 12a-13a (footnote 5) and Appendix pages 58a-59a (including footnote 12) of Whitworth II, the Court of Appeals utilized factual evidence that was not part of the record on appeal.

Prior to filing its appellate brief in the Court of Appeals, Respondent

Central States filed a Motion to Strike or in the Alternative, to Supplement the Record on Appeal (herein "Motion to Strike or Supplement the Record"), along with the Brief of the Appellees. As a part of the Motion to Strike or Supplement the Record, Appellees attached the lengthy affidavit of James Burke and exhibits A-G. None of these evidentiary materials were ever filed in the District Court prior to judgment. Central States also improperly referenced, in detail, this new Affidavit and Exhibits throughout the Brief of the Appellees. Whitworth Bros. opposed same and cited authority for this position.[12]

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[12]See Fed.R.App.P.10(a)(only materials filed in the district court constitute the record on appeal); Richardson v. Blanton, 597 F.2d 1078, 1079 (6th Cir.)(affidavit filed after entry of judgment and notice of appeal not considered), cert. denied, 444 U.S. 886 (1979); Henn v. National Geographic Society, 819 F.2d 824, 831 (7th Cir.), cert. denied, 484 U.S. 964 (1987);

Prior to oral argument, the Court of Appeals denied Central States' motion to supplement the record.

Surprisingly, the Court of Appeals opinion utilized non-record evidence, and affirmed the judgment of the trial Court on the basis of this non-record evidence. Petitioner challenged this use in its Petition for Rehearing, which the Court of Appeals denied. Appendix, pages 68a-69a.

Specifically, the Court of Appeals used:

1) Central States is under a "self-reporting system" in which employer is responsible for

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Huelsman v. Civic Center Corp., 873 F.2d 1171, 1175 (8th Cir. 1989); United States ex rel. Bradshaw v. Alldredge, 432 F.2d 1248 (3d Cir. 1970)(Biggs, J.)["It is, of course, black letter law that a United States court of appeals may not consider material or purported evidence which was not brought upon the record in the district court."](Emphasis supplied).

notifying the fund of a change in employee status; Appendix pages 12a-13a; Contra page 5a (role of local union)

2) employers contributed on behalf of "391,000 employee participants between 1964-1981; Appendix page 59a;

3) it is "administratively impossible" to audit so many employers, Appendix page 58a-59a;

The only source of these "facts" is the non-record Burke Affidavit filed in the Court of Appeals.

Fed.R.App.P.10 safeguards due process principles under the Fifth Amendment. In a similar situation, Judge Easterbrook wrote:

> "The plaintiff's brief in this case was larded to citations to materials

> that were not before the district judge when he passed on the motion for summary judgment * * * * Counsel is wrong. See Fed.R.App.P. 10(a) (only materials filed with the district court are in the appellate record) * * * *. The parties may rely on appeal only on materials furnished to the district judge. Otherwise they deprive the opposing party of an opportunity to comment on them and the district judge of an opportunity to evaluate their significance.

Henn v. National Geographic Society, 819 F.2d 824, 831 (7th Cir.)(Emphasis supplied), cert. denied, 484 U.S. 964 (1987).

Whitworth Bros. had no opportunity to contest the self-serving affidavit of Burke. Such an opportunity would have adduced contrary facts for the Court to review. These "facts" were used by the Court of Appeals to justify affirming the district court's grant of summary judgment.

The Rules Enabling Act, 28 U.S.C. § 2072(b) requires that the Federal Rules be construed in a manner that does not

abridge the substantive rights of litigants. The federal rules are the product of careful study and review. Burlington Northern R. Co. v. Wood, 480 U.S. 1, 6 (1987). Following the plain meaning of the rule safeguards legal and constitutional standards. The Fifth Amendment, at its essence, requires a fair procedure and a minimum standard of fair play. The Court of Appeals has made an unwarranted departure from the federal appellate rules, enough to call for redress by this Court.

V. CONCLUSION

Because this case is worthy of this Court's attention, this Court should grant Whitworth Bros. petition for writ of certiorari.

Respectfully Submitted,

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92-1848

NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

WHITWORTH BROTHERS STORAGE CO.,
Petitioner,
vs.
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
Respondents

APPENDIX

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NO. 92-3085
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WHITWORTH BROTHERS STORAGE COMPANY,

Plaintiff-Appellant

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

ON APPEAL from the United States District Court for the Northern District of Ohio

Decided and Filed January 11, 1993

Before: MILBURN and BATCHELDER, Circuit Judges; and CONTIE, Senior Circuit Judge.

CONTIE, Senior Circuit Judge.

Plaintiff-appellant, Whitworth Brothers Storage Company, appeals the district court's grant of summary judgment

to defendants-appellees, Central States, Southeast & Southwest Areas Pension Fund, in this action for restitution under federal common law for a refund of contributions plaintiff mistakenly made to Central States. For the following reasons, we affirm in part, reverse in part, and remand the case to the district court for further proceedings.

I.

Defendant-appellee, Central States Southeast and Southwest Areas Pension Fund ("Central States" or "The Fund"), is a multiemployer employee pension benefit plan as defined in 29 U.S.C. § 1002(2)(A) of the Employee Retirement Income Security Act ("ERISA") of 1974. Plaintiff-appellant, Whitworth Brothers Storage Company ("Whitworth Bros. Storage" or "the

Company"), is an employer that paid contributions to the Fund for the accounts of employees William Whitworth[1] and Ernest Whitworth in the mistaken belief that they were employees who were eligible to receive pension benefits from the Fund.

William and Ernest Whitworth were co-owners, shareholders, and officers of Whitworth Bros. Storage, a family-operated business begun by their father. The two brothers drove trucks and carried furniture and were members of the Teamsters and Local Union 392.

Plaintiff claims that the mistake underlying this lawsuit began in 1955 when a union official informed the Whitworth brothers that as members of the Teamsters Union they were covered by the Union's collective bargaining agreement that

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[1]William Whitworth is now deceased.

required contributions to Central States for pension benefits. Neither plaintiff nor defendants sought verification of William and Ernest Whitworths' eligibility to receive pension benefits from the Fund. The Fund accepted Whitworth Bros. Storage's representation that it owed the Fund monthly contributions for Ernest and William Whitworth and billed them accordingly.[2] Whitworth Bros. Storage alleges that for over twenty-five years, it made contributions totaling $20,000 to the Fund on behalf of William and Ernest Whitworth.[3]

---

[2]The billing process was relatively routine. Central States sent a monthly or quarterly statement; one copy was sent back to Central States and the remittance was sent to a bank; one copy was sent to Local Union 392; and one copy was the employer's.

[3]Until the Glenville riots in 1969, Whitworth Bros. Storage paid pension contributions for two or three other

Seeking to retire in late 1978 or early 1979, William Whitworth wrote to the Board of Trustees ("the Trustees") of the Fund regarding his pension. On January 26, 1979, the Director of Pension History at Central States, Mr. Bey, wrote William Whitworth indicating that inasmuch as his employer was Whitworth Bros. Storage, the Fund believed that he may not be an employee covered by the collective bargaining agreement who was eligible to receive pension benefits. The letter asked whether he held any ownership in the Company and informed him that owners and managers normally did not fall within the category of employees covered by the collective bargaining agreement. (Appendix, p.51).

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employees. Since 1969, the only two persons for whom contributions were made were William and Ernest Whitworth.

On February 3, 1979, William Whitworth responded to Mr. Bey:

> Re: My Status:
>
> There is no change in my status here since I joined the union in 1934. I carried furniture for a living then, with m y father and brother. . . .So for the past 45 years I have been a member in good standing and still am a working, paying member.
>
> What I want to know is: when I decide not to carry furniture any more, what can I expect from my union's pension fund to which I have contributed since its inception.
>
> Note: This also concerns my brother (Ernest Whitworth) with whom I am presently working.
>
> /s/ Wm. Whitworth

(Appendix, p.121)

The record is unclear about the manner in which Central States responded as a letter that Central States wrote to Local 392 on March 14, 1979 (a copy of which was sent to William Whitworth) is

not a part of the record. Central States continued billing Whitworth Bros. Storage for contributions on behalf of both brothers.

On March 1, 1980, William Whitworth ceased working and Whitworth Bros. Storage ceased making contributions to Central States on his behalf. On his March 30, 1980 bill, William Whitworth wrote: "I retired as of March 1, 1980. Waiting for pension ck." On June 16, 1980, Central States wrote William Whitworth regarding his application for pension benefits, asking him if he had the right to hire or fire while employed at Whitworth Bros. Storage. (Appendix, p.54). On August 20, 1980, Central States wrote William Whitworth telling him that his eligibility to receive pension benefits had not been established and that his application was

being placed in the Fund's rejection files. The letter stated that if additional information were submitted, the application would be reopened. (Appendix, pp. 52-53).

On November 4, 1980, plaintiff Whitworth Bros. Storage obtained counsel, who wrote to Central States demanding that Central States pay William Whitworth pension benefits as a beneficiary or return to the Company all contributions toward pension benefits made to the Fund on his behalf. Central States received this letter on November 10, 1980. (Appendix, p.56).

After further correspondence between plaintiff's counsel and the Fund, on May 19, 1981, Whitworth Bros. Storage conceded in a letter that since William Whitworth had been paid as an owner, not as an

hourly employee of the Teamsters Union, he was not covered by the collective bargaining agreement as an employee and not eligible to receive pension benefits.[4] The letter repeated a demand for a refund of the contributions paid by mistake by the Company on William Whitworth's behalf. (Appendix, p.57).

On July 23, 1981, Central States denied Whitworth Bros. Storage's request for a refund of $7,890 covering the period of May 31, 1964 through March 1, 1980 for contributions made on behalf of William Whitworth. It is Central States' policy to limit refunds for contributions made by a mistake of fact or law to the one year

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[4]Some employer-owners are eligible to participate in the Fund if they work full time in the bargaining unit and are subject to all its conditions including being paid the hourly union wage. The Whitworth brothers were not paid an hourly wage.

prior to a formal request for a refund. Pursuant to this policy, Central States granted plaintiff Whitworth Bros. Storage a refund of $384.00 for the contributions made on behalf of William Whitworth between November 11, 1979 and March 1, 1980. Central States stated that it had received a refund request in regard to contributions made on behalf of William Whitworth on November 10, 1980 from Eugene Selker, attorney for the Company, and that pursuant to its one-year refund limitation policy, it would allow a refund for contributions made from November 11, 1979 (one year prior to the date of the November 10, 1980 refund request) until March 1, 1980, when the Company ceased making contributions on behalf of William Whitworth. (Appendix, pp. 59-62).

In July, 1981, after the refund

request on behalf of William Whitworth was denied, Whitworth Bros. Storage ceased making contributions on behalf of Ernest Whitworth without ever requesting a refund of the contributions previously made by the Company on his behalf.

Central States continued assessing and billing Whitworth Bros. Storage for contributions for Ernest Whitworth through May, 1983. Until August 1984, Central States billed Whitworth Bros. Storage monthly for previous delinquent contributions, assessed interest penalties, and threatened collection action.[5]

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[5]Central States operates under a self-reporting system in which an employer is responsible for notifying the Fund of the change in the status of any employee. Otherwise, the Fund continues billing the employer for all previous employees for whom contributions have been made. Because the Fund never received any notification concerning Ernest Whitworth,

On September 15, 1983, plaintiff Whitworth Bros. Storage filed a complaint against defendant Central States in the United States District Court for the Northern District of Ohio. On Count I, plaintiff sought an $11,000 refund for contributions it had made on behalf of William Whitworth from January 1, 1975 through March 1980 and on behalf of Ernest Whitworth from January 1, 1975 through July 1981 in the mistaken belief that William and Ernest Whitworth were employees covered by the collective bargaining agreement who were eligible to receive pension benefits. A refund of contributions mistakenly made is permissible under 29 U.S.C. § 1103(c)(2)(A)(ii), a provision of ERISA

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it continued billing Whitworth Bros. Storage for contributions on his behalf.

enacted on January 1, 1975.

On Count II, plaintiff sought a refund of approximately $9,000 for contributions it had made from 1955 through December 31, 1974 on behalf of William and Ernest Whitworth in the mistaken belief that they were employees covered by the collective bargaining agreement. Plaintiff invoked jurisdiction for a claim for these pre-ERISA contributions pursuant to a pendent state law action for restitution.

On Count III, plaintiff sought a declaratory judgment on whether the Company owed back contributions to the Fund for the period from August 1981 through May 1983 in regard to Ernest Whitworth.

On January 15, 1985, the district court dismissed the complaint for lack of

subject matter jurisdiction, holding that under 29 U.S.C. § 1132(a)(1), employers are not authorized to maintain an ERISA action. On appeal, this court in Whitworth Brothers Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund, 794 F.2d 221 (6th Cir.), cert. denied, 479 U.S. 1007 (1986)("Whitworth I") reversed and remanded. This court held that the plaintiff-employer, Whitworth Bros. Storage, had a federal common law cause of action to recover the contributions in the nature of an equitable action for restitution. Id. at 236. On remand, Central States moved for summary judgment, which the district court granted on December 19, 1991 in regard to Counts I and II. The district court denied the pendent state law claim for contributions

made prior to the enactment of ERISA on January 1, 1975 based on the contract between the parties. In regard to the post-ERISA contributions made after January 1, 1975, the district court found that Central States' one-year refund limitation policy was not arbitrary and capricious. The district court held that the Trustees' decision to deny the refund request for post-ERISA contributions made on behalf of William Whitworth outside the Fund's one-year refund limitation rule was not arbitrary and capricious. In regard to Ernest Whitworth, the court held no refund was due for the post-ERISA contributions made on his behalf after January 1, 1975, because Ernest Whitworth never made a timely request for a refund. On Count III, the district court ruled that Whitworth Bros. Storage had made

contributions to the Fund by mistake as William and Ernest Whitworth were not employees covered by the collective bargaining agreement who were eligible to receive pension benefits from the Fund. Therefore, no delinquent contributions were due for the period from August 1981 through May 1983 on behalf of Ernest Whitworth. Accordingly, judgment was entered for plaintiff on Count III.[6]

Plaintiff filed a timely notice of appeal in regard to Counts I and II on January 15, 1992.

II.

In considering the issues presented, we must first examine the applicable law. Central States is an employee pension

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[6]Since there was no cross-appeal by Central States on Count III, this issue is not contested before this court.

benefit plan as defined by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1401. Resolution of the claims for a refund in the present case defends upon the applicability and meaning of an amendment to ERISA enacted on September 26, 1980.[7] ERISA, effective for an employer's contributions to a pension fund made after January 1, 1975, preempts all state law concerning employment benefits. 29 U.S.C. § 1144(a). Before September 26, 1980, 29 U.S.C. § 1103(c)(2)(A) permitted a pension plan to return contributions made by an employer under a mistake of fact within one year after the payment of the contributions.[8]

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[7]This amendment was a provision of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA").

[8]Section 403(c)(1) of ERISA sets forth the general rule that "the assets of a [multiemployer pension] plan shall never

For purposes of this case, if Congress had not changed the law in 1980, a refund of the payments made by Whitworth Bros. Storage by mistake would not have been permitted; most courts would have characterized the contributions made by the Company on behalf of William and Ernest Whitworth as a mistake of law rather than a mistake of fact, and prior to 1980, ERISA did not permit a refund for contributions made by mistake of law. See, e.g., Martin v. Hamil, 608 F.2d 725, 729 (7th Cir. 1979)(contributions made on the basis of erroneous advice from a union official are based on a mistake of law);

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inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries. . . ." 29 U.S>C. § 1103(c)(1). This sweeping prohibition is tempered by a number of limited exceptions, one of which is 29 U.S.C. § 1103(c)(2)(A), the provision at issue in the present case.

Chase v. Trustees of the Western Conference of Teamsters Pension Trust Fund, 753 F.2d 744, 750-51 (9th Cir. 1985)(it is a mistake of law when contributions are made on behalf of an individual on the assumption that the individual is an employee, when, in fact, the individual is ineligible to participate in the pension fund).

On September 26, 1980, Congress amended § 1103(c)(2)(A) of ERISA to read, in pertinent part, as follows:

> In the case of a contribution. . .made by an employer to a multiemployer plan by a mistake of fact or law. . ., paragraph (1) shall not prohibit the return of such contribution or payment of the employer within 6 months after the plan administrator determines that the contributions was made by such a mistake.

29 U.S.C. § 1103(c)(2)(A)(ii). Further, the following subsection of that amendment provides:

> The amendment made by this section shall take effect on January 1, 1975, except that in the case of contributions received by a collectively bargained plan maintained by more than one employer before the date of enactment of this Act [Sept. 26, 1980], any determination by the plan administrator that any such contribution was made by mistake of fact or law before such date shall be deemed to have been made on such date of enactment.

Pub.L. No. 96-364, § 410(c), 94 Stat. 1208, 1308 (1980). These provisions clearly indicate that the trustees of a multiemployer pension plan, such as Central States, may return contributions made by employers under a mistake of fact or law within six months after the plan administrator determines that the contributions were mistakenly made. The subsection states that the amendment may be applied retroactively to any contributions made subsequent to January

1, 1975, the date of the enactment of ERISA.

The amendment greatly expanded the scope of section 1103(c)(2)(A) for multiemployer pension plans: it added mistake of law as a basis for a refund of contributions as well as a mistake of fact and eliminated the one-year limitation for the return of contributions.[9] There is no express limitation as to the number of mistaken contributions that can be refunded under 29 U.S.C. § 1103(c)(2)(A)(ii), which provides merely that the contributions must be returned within six months after the plan

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[9]The mistake of law provision was added because the requirement that a contribution be made due to a mistake of fact in order to be returned to the employer [of a multiemployer plan] is too narrow." Joint Explanation of S. 1076: Multiemployer Pension Plan Amendments Act of 1980, 126 Cong.Rec.S. 10130 (July 29, 1980).

administrator determines that the contributions were made by mistake. The language of section 1103 is thus permissive, simply allowing, but not mandating, pension funds to return contributions. There is no explanation in the legislative history for the elimination of the one-year limitation and the substitution of the six-months provision. This liberalization of the statutory provision for the refund of contributions, however, might encourage more employer and employee pension plan participation, and thus is certainly not inconsistent with the MPPAA's intent to foster plan continuation and growth. H.R.Rep.No. 869(I), 96th Cong. 2nd Sess. 4, reprinted in 1980 U.S.C.C.A.N. 2918, 2919.

In the present case, Whitworth Bros.

Storage seeks restitution of contributions made before and after the effective date of ERISA -- January 1, 1975. Therefore, in the com plaint, Count I requests a refund for contributions made after the effective date of ERISA pursuant to 29 U.S.C. § 1103(c)(2)(A)(ii), and Count II requests a refund for contributions made prior to the enactment of ERISA in a pendent state law claim for restitution.

III.

We will first address the pendent state law claim for the refund of pre-ERISA contributions made on behalf of William and Ernest Whitworth before January 1, 1975. Plaintiff Whitworth Bros. Storage contends that its claim for pre-ERISA contributions comes within the purview of ERISA, which was enacted on

January 1, 1975, because a cause of action accrues upon discovery of the mistake and the mistake was not discovered until 1981.

This argument is to no avail. In Crews v. Central States, Southeast and Southwest Areas Pension Fund, 788 F.2d 332 (6th Cir. 1986), this court reviewed a similar claim demanding a refund for contributions made pre-ERISA (i.e., prior to January 1, 1975), which had been denied by Central States. In Crews, this court held that no state law claim remained in the action and that the recovery of pre-ERISA contributions was barred by Central States' contract, which stated that there was a one-year limitation on the recovery of refunds for contributions made by mistake. Id. at 336-37. The same contractual provision was in effect for the pre-ERISA contributions at issue in

the present case. Our decision in Crews is controlling, and the district court properly determined that no pre-ERISA state law claim to recover pre-1975 contributions remained in the action. The district court is affirmed on this issue.

IV.

We must next decide whether the district court erred in ruling, on a motion for summary judgment, that Central States' one-year refund limitation policy in regard to the post-ERISA contributions made after January 1, 1975 is not arbitrary and capricious. The district court's grant of summary judgment is reviewed de novo. EEOC v. University of Detroit, 904 F.2d 331, 334 (6th Cir. 1990). Thus, we must determine whether "the pleadings, depositions, answers to

interrogatories, and admissions on file. . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc., 862 F.2d 597, 601 (6th Cir. 1988).

Plaintiff argues that the Fund's one-year refund limitation policy is arbitrary and capricious because it is supported by no actuarial data indicating that the Fund will be harmed if overpayment or mistaken contributions made outside of one-year are returned. Plaintiff argues that the Fund has been unjustly enriched by keeping the contributions made on behalf of William and Ernest Whitworth as the Fund does not have to pay pension benefits on their behalf and the Company receives nothing in return for the amounts it paid by mistake.

Central States argues that it need not return the post-ERISA contributions plaintiff made after January 1, 1975, because the collective bargaining agreement specified that there was a one-year refund limitation on the return of contributions made by an employer under a mistake of fact or law, and the limitation is not arbitrary and capricious. The refund provision in the trust agreement reads:

> In no event shall the Employers, directly or indirectly, receive any refund on contributions made by them to the Trust, except a refund of contributions made by a mistake of fact or law (other than a mistake about plan qualification or tax-exempt status pursuant to the Internal Revenue Service Code) as determined by the Trustees if application thereof is received within one year after payment of the contributions. In no event shall the Employers, directly or indirectly, participate in the disposition of the Trust Fund or receive any benefits from the Trust Fund.

Article XIV, Section I of the Trust Agreement. Central States argues that our decision in Crews is controlling because in Crews, this court upheld Central States' denial of a refund for post-ERISA contributions under a trust agreement provision almost identical to the one at issue in the present case.

We disagree that Crews is controlling in regard to this issue. Although the facts in Crews are similar to those of the present case, Crews was decided under a prior provision of ERISA. Crews had been informed by the Teamsters that he was required to join the union and contribute to its pension funds. Because Crews was a 50 percent owner of the company that was the employer who had contributed to the Fund, he was not an employee eligible to receive pension benefits. Central States,

therefore, rejected Crews' application for pension benefits and also denied the company's request for a refund of the contributions it had made on his behalf. 788 F.2d at 333-34.

Although in Crews a panel of this court upheld the denial of the refund, the panel never considered whether Central States' one-year refund limitation policy in regard to post-ERISA contributions is arbitrary and capricious. Instead, in Crews, this court upheld Central States' denial of the refund request based on the applicable statutory provision of ERISA in effect at the time. Id. at 337. In Crews, Central States denied the claim for a refund in the year 1978 when a prior provision of ERISA was in effect. Id. at 335. The prior provision of ERISA stated that a benefit plan could refund

contributions made by mistake of fact, but could not give a refund for contributions made by mistake of law. This court held that the employer in Crews had made erroneous contributions based on a mistake of law. Id. at 337. Because the applicable provision of ERISA in effect at the time forbid a refund for contributions made due to a mistake of law, the employer in Crews could not receive a refund.

This portion of our decision in Crews is not applicable to the post-ERISA claims in the present case because ERISA was amended in 1980 to allow refunds for the contributions made by a mistake of law as well as for those made by a mistake of fact, and the Central States' Trustees in the present case denied the request for a refund in 1981 when the amended law, allowing refunds for contributions made by

a mistake of law, was in effect.

This court did state in a footnote in Crews that although ERISA had been amended in 1980 to allow a refund for mistakes of law with no time limitations, the amendment did not prevent the parties to an agreement from providing for more restrictive terms regarding refunds. Id. at 337, n.2. In a footnote in Whitworth I, this court stated that a claim for restitution is limited by the terms of the agreement between the parties. 794 F.2d at 236, n.24. However, this statement did not mean that any limitations in regard to the refund of contributions made by mistake would be upheld. Whitworth I stated that plaintiff could bring an action for restitution under federal common law, and in a common law action for restitution, it must be determined if a

limit on the return of money paid by mistake is fair and equitable in order to prevent unjust enrichment.

Most other courts of appeals that have considered the issue have held that unless a refund limitation policy is necessary to the financial soundness of the pension benefit plan based on actuarial data, such a policy is arbitrary and capricious as it results in unjust enrichment. In other words, even if the parties may contract for more restrictive terms, it does not necessarily follow that any refund restriction a pension plan wishes to make will be reasonable. The restriction cannot be arbitrary. The standard of review as articulated by this court in Teamsters Local 348 Health and Welfare Fund v. Kohn Beverage Co., 749 F.2d 315, 312 (6th Cir. 1984), cert.

denied, 471 U.S.1017 (1985) is that "the trustees action is conclusive unless arbitrary and capricious, not supported by substantial evidence, or erroneous as a matter of law."

The district court in the present case held that Central States' one-year refund limitation policy is reasonable, relying on Fuller Cinder Co. v. Central States Pension Fund, 2 Employee Benefits Cas. 2458, 2460 (E.D.Mich. 1982). However, the district court failed to consult the various opinions of the courts of appeals that have considered this issue, did not take into account equitable considerations, and provided no reasoning for its decision.

The circuit courts are split in regard to the issue of whether a federal court may determine in an action for

restitution under federal common law that a contractual limitation on refunds for contributions mistakenly made is unreasonable. The only circuit that upholds any contractual limitation in regard to refunds as binding under federal common law is the Ninth Circuit.[10] In Admiral Packing Co. v. Robert F. Kennedy Farm Workers Medical Plan, 874 F.2d 683 (9th Cir. 1989), the Ninth circuit upheld the medical plan's one-year refund limitation policy. Id. at 684. The court stated that nothing in 29 U.S.C. §

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[10]In Van Orman v. American Ins. Co., 680 F.2d 301 (3rd Cir. 1982), the Third Circuit stated that it was reluctant to fashion a federal common law cause of action under a doctrine of unjust enrichment for overpayment or mistaken contributions when "such a right would override a contractual provision." Id. at 312. This opinion is in conflict with this court's opinion in Whitworth I, which states that there is such a federal common law cause of action.

1103(c)(2)(A) of ERISA prevents a fund from adopting a more restrictive provision in a trust document. Id. at 685. The Ninth Circuit concluded that a federal court cannot set aside rules affecting pension benefits when they are fixed by the terms of a collective bargaining agreement and violate no command of Congress. Therefore, the one-year refund limitation policy was found to be valid. Id. at 686.

The majority of the courts of appeals disagree with the Ninth Circuit and examine the refund provision of a benefit fund's trust agreement to see if it is arbitrary and capricious as weighed by principles of equity. In Jamail Inc. v. Carpenters District Council of Houston Pension & Welfare Trusts, 954 F.2d 299, 305 (5th Cir. 1992), the Fifth Circuit

held that a six-month refund limitation rule was not equitable. In Jamail, the Pension and Welfare trusts notified Jamail, the employer, that the company had erroneously made $51,434.68 in contributions on behalf of its employees for hours worked on jobs not covered by the collective bargaining agreements. The Trust Fund refused to refund the full overpayment because of its policy of a six-month limit on refunds. Id. at 301.

The Fifth Circuit held that under equitable principles, the sixth-month limitation in the refund policy was unduly limiting, stating:

> The Trust Funds audits the employers every four years, and they have four years to bring an action against the employers for inadequate payments. Employers, however, are granted refunds for only a six month period. Justice demands a directly reciprocal limit; recovery of underpayment and refund of overpayment should be possible for an equal period.

Id. at 305. The Jamail court believed that allowing such a refund on a common law right of restitution and equitable considerations was compatible with ERISA's policies. The court stated:

> There are valid reasons why an employer might make an overpayment of contributions to a fund. A simple keypunch error could cost an employer thousands of dollars. An employer also, as in this case, could make an honest mistake in calculating the amount it owes. Moreover, not every pension fund will necessarily be administered in a reasonable manner. An unscrupulous trustee could extort money out of an employer by fraud and then refuse to refund the money. Plucinski, 875 F.2d at 1058. We mention the examples only as illustration of the potential for overpayment of contributions to pension plans.
>
> An important component of ERISA is it does not compel the establishment of employee pension funds. It is optional for an employer to establish an ERISA qualifying pension plan. We want to encourage small and fledgling employers, such as Jamail, to provided benefit plans for their employees. Putting the risk of unjustified loss in situations such as this on employers may discourage

> employers from even establishing such benefit plans. Moreover, if ERISA is going to achieve its objective, it should encourage employers to err toward overpayment rather than to slight the fund because of a fear that there can be no effective restitution. If employers perceive that no refunds are available, they are likely to delay payment to the fund until they can calculate accurately the precise amount they owe. This denies to the fund working capital which could be crucial to its survival. It is true that ERISA is properly construed to benefit employees, but a fundamental fairness to employers is implicit in establishing such funds.

Id. at 304. The court of appeals therefore ordered the Trust Funds to refund Jamails' $51,434.68 in overpayment. Id. at 306.

In Dumac Forestry Services, Inc. v. International Broth. of Elec. Workers, 814 F.2d 79, 83 (2nd Cir. 1987), the Second Circuit held that a remand was required to determine whether a three-year limitation on refunds was arbitrary and capricious.

The Fund (NEBF) argued that while section 1103(c)(2)(A)(ii) of ERISA does not prohibit refunds of overpayment, neither does it require them. Consequently, NEBF urged a construction of the statute under which refund decisions would be made under the refund policy adopted by the trustees pursuant tot their discretionary authority under ERISA, subject to judicial review only under an arbitrary or capricious standard. NEBF contended that its three-year refund policy was not arbitrary or capricious. Id. at 82.

The Second Circuit refused to accept this argument. After noting the limited arbitrary and capricious standard under which it could review the administrative acts of pension fund trustees, it found that the district court had failed to adequately take into account equitable

considerations in denying Dumac's summary judgment motion for a refund.

> Judge McCurn [the district court] properly noted the applicable "arbitrary or capricious" standard of review and was unwilling to find, as a matter of law, that the policy was arbitrary. We agree that on the limited record before him, he could not have done otherwise. It was improper, however, for the district court to grant summary judgment....
>
> We think it apparent that a determination as to the trustee's refund policy could not be made on the record before the district court at the time the cross=motions for summary judgment were made. It is beyond dispute that protection of the financial integrity of multiemployer pension funds is the touchstone of ERISA. See 29 U.S.C. § 1001 (1982). Consequently, NEBF's refund limitation rule must be evaluated in light of actuarial and other data considered by the trustees when they adopted the rule --data that were not part of the record before the district court. For example, although NEBF contends that its rule was adopted to secure the funds' fiscal stability by barring refunds of large overpayment made over long periods of time, we have been directed to no support in the record for that assertion....

Id. at 82-83 (emphasis added).[11] The court concluded that a remand was required to determine whether the refund rule was arbitrary and capricious based on equitable principles and that a principal equitable consideration is whether restitution would undermine the financial stability of the plan. Id. at 83.

Other courts have agreed with the Second Circuit that a principal equitable consideration in determining whether a refund limitation rule is valid is whether restitution would undermine the financial stability of the plan. In Plucinski v. I.A.M. National Pension Fund, 875 F.2d 1052, 1053 (3rd Cir. 1989), the Third Circuit held that an employer may recover

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[11]Similarly, in the present case, Central States argues that the one-year limit is necessary for the Fund's fiscal stability, but provides no support in the record for this argument.

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contributions made by mistake when the court finds it equitable, but that if restitution would result in underfunding of the pension plan, it would be inequitable to order it. The Third Circuit stated, "If we put the burden of mistaken payments wholly on employers, we may discourage some employers from operating ERISA qualifying plans. It thus further the purposes of ERISA to recognize [a] cause of action [for unjust enrichment.]" Id. at 1058.

In Peckham v. Board of Trustees of International Broth. of Painters and Allied Trades Union and Industry National Pension Fund, 719 F.2d 1063 (10th Cir. 1983), the Tenth Circuit ordered restitution of contributions erroneously made by union members who were self-employed, based on the following

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reasoning:

> The record contains no evidence that the pension fund would be underfunded if the trustees returned plaintiffs' contributions. The contributions were made pursuant to a money purchase rather than a fixed benefit plan concept because employers apparently contributed a certain amount per hour of work by each participant. The trustees complain that a refund will diminish the plans' assets but neglect to mention the corresponding decrease in the fund's liabilities because the individuals for whom these contributions were made will not be entitled to pensions. Under the circumstances, the fund clearly would be unjustly enriched if it retained these monies.

Id. at 1066. Therefore, In Peckham, the court held that it was an abuse of the trustees' discretion to deny a refund.

In Chase, 753 F.2d at 753, the court of appeals held that restitution should be allowed if the refund would not affect the fund's financial stability. in Chase, the trustees had introduced evidence on the effect of a refund on the actuarial

soundness of the plan, but the district court did not make any findings on the issue, so the case was remanded for further consideration in this regard.

The court in Kwatcher v. Mass. Service Employees Pension Fund, 879 F.2d 957, 966 (1st Cir. 1989) considered whether 29 U.S.C. § 1103(c)(2)(A)(ii), which permits a refund to employers resulting from overpayment, is merely permissive and allows a fund complete discretion in making refunds. The court found that the regime urged by the pension fund, which was to give it complete discretion, would violate federal common law. Id. The court reasoned:

> It is not uncommon for employers erroneously to disburse large sums to employee benefit plans, believing the extra payments mandated by ERISA and/or the plan documents. under the regime urged by appellee, pension funds would be permitted to retain all such sums. Since there would be

> no incentive to return mistaken payments voluntarily, the permissive refund mechanism, 29 U.S.C. § 1103(c)(2)(A), would be like a permanently shut window: decorative, but of no assistance in letting in a breath of fresh air.
>
> We will not lightly assume that Congress intended to enact a self-nullificatory refund provision. We are equally loath to think that Congress means either to craft a heads-I-win, tails-you-lose matrix, or to institutionalize a one-sided windfall permitting employee-participants to sponge off an employer's good-faith bevues. In the long run, penalizing employers for undercontributing, while refusing to refund their excess contributions, could frustrate ERISA's goal of expanding pension plan coverage. Manifest inequity is one effective way of discouraging employers from sponsoring ERISA-qualified plans at all.

Id. at 965-66 (citations omitted). The court state that Congress expected "that a federal common law of rights and obligations under ERISA-regulated plans would develop" and that "federal courts may award restitution to employers in

ERISA cases where principles of equity make such an award appropriate" when one party would be unjustly enriched at the expense of another. Id. at 966.

We agree with the reasoning of the Fifth, Second, Third, Tenth, and First Circuits that a restriction on refunds must not be arbitrary and capricious as measured by equitable principles. A pension fund's refusal to refund contributions paid by mistake is arbitrary unless necessary to the financial soundness of the plan or justified by some other compelling reason. in the present case, the grant of summary judgment on this issue was not proper because the district court merely proclaimed that the one-year refund limitation provision was reasonable without providing any analysis or taking into account principles of

equity. Because the record is insufficient to determine whether a one-year refund limitation policy is necessary to ensure Central States' financial stability as the Fund alleges, a remand is necessary.

Contrary to defendant's contention, this court has not interpreted Whitworth I to mean that an equitable action for restitution will necessarily be denied on the basis of a clear limitation in the contract. In Kentucky Laborers District Council Health & Welfare Fund v. Hope, 861 F.2d 1003, 1005 (6th Cir. 1988), this court rejected the argument that if the terms of the collective bargaining agreement are unambiguous and clear, they dictate the result in an equitable action for restitution.

Moreover, in Wells v. U.S. Steel &

Carnegie Pension Funds, Inc., 950 F.2d 1244, 1250 (6th Cir. 1991), this court held that the provisions of a pension fund's trust agreement are governed by trust law, not contract law. In Wells, a pension fund filed a counterclaim for the recoupment of alleged overpayment of $6,000 to $50,000 per person it had made to thirty-one former employees of United States Steel Corporation, who, upon retirement, had begun drawing pension benefits from the fund. Id. at 1247. The trust agreement permitted recoupment of the overpayment from the retirees, but this court stated that "ERISA is governed by trust, not contract law." Id. at 1250. The court was concerned with the possible inequitable impact that recoupment of the benefits already paid by the fund to the retirees could have on the retirees, who

had submitted affidavits describing the hardship they would suffer if they were forced to pay back the benefits which they had already received and depended upon. Because of these concerns, the court remanded the case to the district court to consider whether, under principles of equity, recoupment should be permitted. Id. at 1251. This court in Wells, thus, has rejected the argument set forth by the Ninth Circuit in Admiral Packing that the provisions of a trust agreement prevail. Instead, in Wells, this court reversed the district court and refused to enforce the recoupment term of the trust agreement without considering the equities involved. Similarly, we believe that in the present case, the district court erred in upholding the one-year refund limitation rule found in the trust agreement without

considering the equities involved.

This position is also supported by recent opinions of the Supreme Court. In Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559 (1985), the Supreme Court stated, "In general, trustees' responsibilities and powers under ERISA reflect Congress' policy of 'assuring the equitable character' of the plans. Thus, rather than explicitly enumerating all the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility." Id. at 570. See also Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989)("ERISA abounds with the language an d terminology of trust law"). In Central Transport, the Supreme Court observed that

Central States' trust agreement (which was the same trust agreement at issue in the present case) gave the Trustees authority to do all acts necessary and proper for the protection of the property held under the trust agreement. 472 U.S. at 570. We believe that unless a refund limitation policy is based on actuarial data and necessary to the pension fund's financial stability, it is not necessary for the protection of the property held under the trust agreement for the benefit of the employees, and is arbitrary and capricious. The fund is receiving a windfall and is unjustly enriched by refusing to return an employer's mistaken contributions when it no longer is obligated to pay pension benefits for the employee on whose behalf the contributions were made. For these reasons, we find

that a pension fund's refusal to refund contributions paid by mistake is arbitrary unless retention of the money is necessary to the financial soundness of the plan or justified by some other compelling reason.

Furthermore, we agree with the reasoning of the First, Second, Third, Fifth, and Tenth Circuits that a determination of whether a refund limitation policy comports with principles of equity in an action for restitution under federal common law furthers the purposes of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPPA")--to encourage greater employer participation in ERISA-covered plans. As the court in Jamail pointed out, achieving equity can work in aid of pension funds as well as for the employers who contribute to them. 954 F.2d at 305. For example, Provident

Life & Accident Ins. Co. v. Waller is a case in which equitable principles were applied to the benefit of the pension fund. 906 F.2d 985, 990 (4th Cir.), cert. denied, 111 S.Ct. 512 (1990). In Waller, a self-funded employee benefit plan advanced money to an employee after an auto accident. The employee later recovered damages from a third-party, but refused to reimburse the benefit plan for the advance. The Fourth Circuit recognized a federal common law right of unjust enrichment to allow the pension fund to recover its money. Thus, our recognition of a common law cause of action in restitution to prevent unjust enrichment can also be a boon for pension funds.

To conclude, the standard of review to be applied is whether Central States'

refund limitation rule is arbitrary and capricious as measured by equitable principles. In the present case, the district court concluded, on a motion for summary judgment, that the one-year refund limitation policy was not arbitrary and capricious, but provided no analysis for this determination other than that the limit was a provision of the contract. Further analysis is needed to determine whether such a limitation is necessary to the Fund's financial stability and comports with the equitable principles discussed herein. The case must be remanded for a factfinding hearing in this regard. We vacate the district court's grant of summary judgment in regard to the issue of whether Central States' one-year refund limitation policy is arbitrary and capricious, and remand the case to the

district court for a determination of this issue as weighed by principles of equity.

V.

In regard to Ernest Whitworth, the district court upheld Central States' denial of a refund for post-ERISA contributions made on his behalf after January 1, 1975 because it found that no refund request was timely made within the one-year limitation provision of the trust agreement.

We agree with the district court's determination that plaintiff never requested that Central States refund the post-ERISA contributions mistakenly made on behalf of Ernest Whitworth before filing a complaint in federal court. However, we believe that the complaint insofar as it concerned the post-ERISA

contributions made on behalf of Ernest Whitworth from January 1, 1975 to July 1981 should have been dismissed for a different reason than that provided by the district court.

Plaintiff argues that it was bad faith for Central States to continue billing for contributions due on behalf of Ernest Whitworth after the Fund had refused benefits and a full refund to William Whitworth in July 1981. Plaintiff argues that because of its bad faith, the Fund is now estopped from denying a refund to Ernest Whitworth.

We disagree with the bad faith argument. Central States operates under a self-reporting system (See Footnote #5), and as long as Central States' records indicate that the employer is reporting employee work history to the pension fund,

the employer will be billed accordingly. It is up to the employer to notify Central States of a change in the status of an employee. We find nothing arbitrary and capricious about such a policy. In the present case, plaintiff did not give the Fund notice that it believed Ernest Whitworth was not covered by the collective bargaining agreement and that it was not required to make contributions on his behalf. The passing reference to Ernest Whitworth in William Whitworth's letter of February 3, 1979 does not suffice. The attorney retained by the Company never mentioned Ernest Whitworth in its correspondence. We agree with the Fund that it is administratively impossible for Central States to review each and every contribution it receives from an employer for verification of

eligibility. Since Central States works on a self-reporting system, the Fund did not have any basis for discontinuing billings to Whitworth Bros. Storage for contributions on behalf of Ernest Whitworth just because benefits and a refund were denied William Whitworth.[12]

Plaintiff never made a refund request to Central States for the return of contributions made on Ernest Whitworth's behalf and thus failed to exhaust its administrative remedies. An employer, such as plaintiff, may not cease making contributions on behalf of an employee and then immediately file a claim in federal court for a refund of prior contributions

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[12]During the period of June 1964 through July 1981 when Whitworth Bros. Storage reported employee work history to the Fund, employers contributed to Central States on behalf of up to 391,000 participants.

made on the employee's behalf in an action for restitution under federal common law without first requesting a refund from the pension fund. It is well-settled law in this circuit that the court will dismiss a claim for failure to exhaust administrative remedies. Brotherhood of Locomotive Engineers v. ICC, 909 F.2d 909, 912-913 (6th Cir. 1990); Director, Office of Worker's Compensation Programs v. Quarto Mining Co., 901 F.2d 532, 536 (6th Cir. 1990); Hix v. Director, Office of Worker's Compensation Programs, 824 F.2d 526, 527 (6th Cir. 1987).

The district court's denial of a refund for contributions made on behalf of Ernest Whitworth after January 1, 1975 thus is affirmed, but for a reason other than that stated by the district court. See Foster v. Kassulke, 898 F.2d 1144,

1146 (6th Cir. 1990)(if district court reaches right conclusion for wrong reason, the court can affirm for reasons other than those stated by the district court.) The claim for post-ERISA contributions erroneously made on behalf of Ernest Whitworth from January 1, 1975 through July 1981 should be dismissed for failure to exhaust administrative remedies.

VI.

Finally, we must decide whether interest should be awarded on whatever amounts are refunded.

Plaintiff's argument that interest should be awarded is contrary to prevailing law. In Airco Industrial Gases, Inc. v. Teamsters Health and Welfare Pension Fund, 850 F.2d 1028, 1037 (3rd Cir. 1988), the court denied Airco's

request for interest on the refund amount, holding that the policies underlying ERISA prevented the court from exercising its equitable powers to award interest. The court was specifically concerned with the policy embodied in 28 U.S.C. § 1103(c)(1), which provides that assets "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." Id. at 1037. The court stated:

> [i]nterest, which is the accrued value of money over time, is not a part of the overpayment but an incident of it. The amount of interest a court might award comes directly from the plan's assets and will deprive participants and beneficiaries of its use. . . .The decision to order restitution is an effort at correcting an injustice, but payment to interest means an amount greater than that paid in as excess contributions may be awarded while the fund has encountered certain [administrative] costs related to the overpayment. An award

> of interest, therefore, could cost the fund more than if the excess contribution had never been made.

Id. The court concluded that the anti-inurement policy of ERISA barred an award of interest on any refund. Id. Accord Dumac Forestry Services, Inc., 814 F.2d at 83 (denying interest on restitutionary award); See also Peckham v. Board of Trustees of International Broth. and Allied Trades Union, 724 F.2d 100, 101 (10th Cir. 1983)(deferring to proposed treasury regulation barring payment of interest).

We agree that the anti-inurement policy of ERISA bars an award of interest on any amount that is refunded.

VII.

To conclude, the opinion of the district court if AFFIRMED in part,

REVERSED in part, and REMANDED for proceedings consistent with this opinion. The district court's denial of a refund for all pre-ERISA contributions made prior to January 1, 1975 and dismissal of the complaint in regard to post-ERISA contributions made on behalf of Ernest Whitworth after January 1, 1975 is AFFIRMED. The grant of summary judgment in regard to post-ERISA contributions made on behalf of Ernest Whitworth after January 1, 1975 is AFFIRMED. The grant of summary judgment in regard to the denial of a refund for post-ERISA contributions made on behalf of William Whitworth after January 1, 1975 is REVERSED and the case is REMANDED for further proceedings in this regard. On remand, the district court must determine whether Central States' one-year refund limitation policy

is arbitrary and capricious as measured by principles of equity. Finally, the district court's decision that no interest is due on whatever amounts are refunded is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 92-3085

WHITWORTH BROTHERS STORAGE COMPANY,

Plaintiff-Appellant,

v.

CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND; BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND; EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND,

Defendant-Appellees

Before: Milburn and Batchelder, Circuit Judges; Contie, Senior Circuit Judge.

JUDGMENT

(Filed January 11, 1993)

ON APPEAL from the United States District Court for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is

ordered that the judgment of the district court is affirmed in part, reversed in part, and the case is remanded for proceedings consistent with the opinion.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

Issued as Mandate: February 24, 1993

A true copy.

COSTS: None

Attest:

Filing Fee. . . .$
Printing. . . . .$

Total.....$

/s/
Deputy Clerk

CASE NO: 92-3085
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

(Filed February 16, 1993)

WHITWORTH BROTHERS STORAGE COMPANY,

Plaintiff-Appellant,

v.

CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND; BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND; EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND,

Defendant-Appellees

Before: Milburn and Batchelder, Circuit Judges; Contie, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed by the appellant, and appellant's motion for costs of appeal,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

It is further ORDERED that the motion

for costs is DENIED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WHITWORTH BROTHERS STORAGE COMPANY	:	CASE NO. 83CV3741
Plaintiff	:	HON. GEORGE W. WHITE
vs.	:	
CENTRAL STATES, SOUTHEAST AND SOUTH WEST AREAS PENSION FUND, et al.	:	MEMORANDUM AND ORDER
Defendants	:	

(Filed December 19, 1991)

Plaintiff brings this action for recovery of contributions mistakenly made to the Central States, Southeast and Southwest Areas Pension Fund under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq. It is alleged that employer contributions were made to the Pension Fund for William Whitworth from january 1, 1975 through

March 1980 and for Ernest Whitworth from January 1, 1975 through July 1981 in the mistaken belief that they were employees covered by the collective bargaining agreement. Demand was made for recovery of such contributions. The Board of Trustees denied the request for return of payments for Ernest Whitworth and partially denied the demand for payments concerning William Whitworth. The complaint also contains a state pendant claim for restitution and a claim for declaratory judgment concerning a bill from the Pension Fund for contributions for Ernest Whitworth. The Court's jurisdiction is predicated on 28 U.S.C. § 1331 and 29 U.S.C. § 1132e(1) and (f). The action had been dismissed for lack of subject matter jurisdiction, the Court holding that employers are not authorized

to maintain an ERISA action pursuant to 29 U.S.C. § 1132(a)(1). The Sixth Circuit Court of Appeals agreed but held that a federal common law cause of action was available and reversed the District Court's decision. Whitworth Brothers Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund, 794 F.2d 221 (6th Cir. 1986). This matter is now before the Court upon defendant's motion for summary judgment.

The Sixth Circuit ruled that the plaintiff has stated a claim for return of mistakenly paid contributions but the claim is limited by the terms ERISA set out in Section 403(C)(2)(A) and by the terms of the agreement of the parties. Id. 794 F.2d at 236 n.24. The Court must concentrate on the evidence before the trustees at the time of their final

decision. Id., Crews v. Central States, Southeast and Southwest Areas Pension Fund, 788 F.2d 332, 336 (6th Cir. 1986). There is no doubt that the Whitworth benefit plan is covered by ERISA and that Whitworth's claim relates to such plan. Whitworth v. Central States, 794 F.2d at 234. This Court must determine whether the trustees decision not to return contributions to plaintiff was arbitrary and capricious, not supported by evidence or erroneous on a question of law. Crews v. Central States, 788 F.2d at 336. In doing so, the Court must interpret the documents executed by the parties and the provisions made therein for payment and refund of contributions. Whitworth v. Central States, 794 F.2d at 234.

Article IV Section 17 of the Trust Agreement provides:

> The Trustees, by majority action, shall have the power to construe the provisions of this Agreement and the terms and regulations of the Pension Plan; and any construction adopted by the Trustees in good faith shall be binding upon the Union, Employees and Employers.

William Whitworth made a demand for a refund on November 10, 1980. At that time the Trust Agreement provided in pertinent part in Article XIV Section 1:

> Sec. 1. In no event shall the Employers, directly or indirectly, receive any refund on contributions made by them to the Trust, except in case of bona fide mistake, and as to which contributions are returned within one year after payment of the contributions. . .

This was in accord with ERISA, 29 U.S.C. § 1103(C)(2)(A). ERISA amended this statute, effective September 26, 1980 which induced the Trustees to amend the Trust Agreement. In December, 1980 Article XIV Section 1 was amended retroactive to September 26, 1980 as

follows:

> "In no event shall the Employers, directly or indirectly, receive any refund on contributions made by them to the Trust, except a refund of contributions made by a mistake of fact or law (other than a mistake about plan qualification or tax-exempt status pursuant to the Internal Revenue Code) as determined by the Trustees if application therefor is received within one year after payment of the contributions."

As of September 26, 1980 a refund could be given if contributions were made by mistake in fact or law.

According to the affidavit of Peter Priede, Group Manager of Operations Accounting for Central States, Southeast and Southwest Areas Pension Fund, Whitworth Brothers submitted contributions on behalf of William Whitworth at various times from June 1964 until March 1980 and on behalf of Ernest Whitworth at various times from June, 1964 until June, 1981. In January, 1979 Central States asked

William Whitworth for information regarding his ownership interests in the Company and informed him that owners are not permitted to participate in the Fund. Subsequently, Central States learned that William Whitworth was not eligible to participate. The Trustees refunded pension contributions made by William Whitworth for the period November 11, 1979 through March 1, 1980.

It appears that Central States refund to William Whitworth conformed to the terms of the Trust Agreement. The Trust Agreement provided for a refund made by a mistake of fact or law if application was received within one year after payment of contributions. So William Whitworth was entitled to receive a refund for contributions made one year before November 10, 1980 when he demanded a

refund. In this case, from November 11, 1979 to March 1, 1980 when he stopped making contributions.

No refund was given to Ernest Whitworth because he did not file a claim. Even if this lawsuit was to be considered a claim, Ernest Whitworth could only receive a refund of the contributions made one year before the claim was made. The last contribution received on behalf of Ernest Whitworth was for the period ending July, 1981. Since the complaint was filed more than two years later, the claim would be late. There is no affidavit or other materials concerning Ernest Whitworth. However, there is no requirement in Rule 56 that the moving party support its motion with affidavits or other materials negating the opponent's claim. Celotex Corp. v. Catrett, 477 U.S. 317, 323

(1986); Street v. J.C.Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989). Plaintiff has not shown that Ernest Whitworth made a timely claim. Therefore, the conclusion is that he cannot receive a refund of mistaken contributions.

Plaintiff has suggested various reasons why the Trustees' decision regarding the refunds was arbitrary and capricious. However, the evidence shows that the Trustees actions were in accordance with the Trust Agreement. 29 U.S.C. 1104(a)(1)(D) requires a trustee to discharge his duties in accordance with the documents and instruments governing the plan. It has been held that the one year policy is reasonable and that it is within the intent of Congress in that it protects the fund and its legitimate participants from benefit losses and

financial instability. Fuller Ander Co. v. Central States Pension Fund, 2 EBC 2458, 2460 (E.D.Mich 1982). Since the trustees acted in accordance with a reasonable trust agreement, the Court finds that the Trustees' decision as to Whitworth's claim for refund was not arbitrary or capricious.

Count Two of the complaint is a claim for restitution of plaintiff's contributions to Central States prior to January 1, 1975 when ERISA became effective. When parties have made specific contractual provisions for refund, such provisions constitute the law to be applied as to those parties. Electricians Health, Welfare and Pension Plans, 594 F.Supp. 1265, 1272 (M.D.La. 1984). In Crews v. Central States, refunds were limited to contributions made

within one year of the request where contributions were due to mistakes of fact. The Court determined that a refund request received on October 6, 1976 limited Crews' recovery to dates after October 6, 1975, a date subsequent to the January 1, 1975 effective date of ERISA. State law claims that would have been for the period before ERISA were barred by the contract of the parties. Id. at 336, 337. Since Whitworth's demands for refund on behalf of William Whitworth was received in 1980 and at a later date, if at all, for Ernest Whitworth, there can be no refund of contributions made before 1975.

Plaintiff seeks a declaratory judgment in Count Three of the complaint that Ernest Whitworth is not covered by the collective bargaining agreement and need not pay a bill for $1,701.86 for his

employee contributions for August, 1981 through May, 1983. The essence of the Court's ruling is that the plaintiff made contributions by mistake and that William and Ernest Whitworth were not covered by the collective bargaining agreement. Therefore, Ernest Whitworth should not have to make contributions for the period August, 1981 through May, 1983.

Accordingly, defendant's motion for summary judgment is granted as to Counts One and Two of the complaint. Because of the Court's ruling on those counts there is no issue of fact remaining on Count Three. Therefore, judgment is for plaintiff on Count Three.

IT IS SO ORDERED.

_____

George W. White
UNITED STATES DISTRICT JUDGE

White, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WHITWORTH BROTHERS STORAGE COMPANY	)	
Plaintiff	)	ORDER
v.	)	CASE NO. 83CV3741
CENTRAL STATES, SOUTHEAST AND SOUTH WEST AREAS PENSION FUND, et al.	)	
Defendants	)	

Pursuant to this Court's Memorandum and order filed contemporaneously with this Order,

IT IS ORDERED that defendant's motion for summary judgment is granted as to Counts One and Two of the complaint. Judgment is for the plaintiff on Count

Three.

IT IS SO ORDERED

George W. White 12-18-91
UNITED STATES DISTRICT JUDGE

STATUTORY PROVISIONS

Employee Retirement Income Security Act of 1974 § 403(c)(1), 29 U.S.C. § 1103(c)(1)

Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

Employee Retirement Income Security Act of 1974 § 403(c)(2)(A)(ii), 29 U.S.C. § 1103(c)(2)(A)(ii)

(2)(A) In the case of a contribution, or a payment of withdrawal liability under Part I of subtitle E of subchapter III of this chapter--

* * * *

(ii) made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

Employee Retirement Income Security Act of 1974 § 514(a), 29 U.S.C. § 514(a)

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title. This section shall take effect on January 1, 1975.

Employee Retirement Income Security Act of 1974 § 514(b)(1), 29 U.S.C. § 514(b)(1)

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

Employee Retirement Income Security Act of 1974 § 514(d), 29 U.S.C. § 514(d)

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this titled) or any rule or regulation issued under such law.

Supreme Court, U.S.
FILED
JUL 19 1993
OFFICE OF THE CLERK

No. 92-1848

(3)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WHITWORTH BROTHERS STORAGE COMPANY,
Petitioner,
v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. A. Whether ERISA provides federal courts with jurisdiction to consider a complaint regarding a post-ERISA action by a plan administrator which is based upon some pre-ERISA conduct?

B. Whether federal common law created pursuant to ERISA provides a cause of action for an employer to sue to recover mistaken contributions paid prior to ERISA where a plan administrator has made a post-ERISA denial of a refund of such contributions?

C. Whether (if such cause of action is provided) the remedy should be limited by a refund limitation contained in the documents governing the plan?

II. Whether the appellate court correctly determined that interest is not available as a remedy on any refund of post-ERISA contributions to Petitioner?

III. Whether the appellate court correctly affirmed a summary judgment that Petitioner's claim for a refund of post-ERISA contributions made on behalf of Ernest Whitworth should be dismissed for failure to exhaust administrative remedies, notwithstanding Petitioner's claim of futility?

IV. A. Whether the appellate court's reference to three background facts was proper?

B. (If not) whether the reference prejudiced or affected the substantial rights of Petitioner?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1848

WHITWORTH BROTHERS STORAGE COMPANY,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,[1]
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

---

[1] Although the caption accurately reflects all parties to this lawsuit, for point of clarification the following Central States Trustees were parties to the proceeding in the Court of Appeals and join in this response: Howard J. McDougall, Robert J. Baker, R.V. Pulliam, Sr., Arthur H. Bunte, Jr., R. Jerry Cook, and Harold D. Leu. Marion M. Winstead and Robert C. Sansone were parties to the proceeding below, but are no longer Central States Trustees. Ray Cash and Joe Orrie are recently appointed Central States Trustees; they join in this response. Ronald J. Kubalanza, the Central States Executive Director, was a party to the proceeding below and joins in this response.

STATUTES

The statutes involved in this case are part of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.* Relevant excerpts from the statute are reproduced in the Appendix, *infra*, pp. 1a-3a, as follows:

29 U.S.C. § 1103(c)(1)
29 U.S.C. § 1103(c)(2)(A)(ii)
29 U.S.C. § 1144(a)
29 U.S.C. § 1144(b)(1)
29 U.S.C. § 1144(b)(2)(A)
29 U.S.C. § 1144(b)(2)(B)
29 U.S.C. § 1144(c)

STATEMENT OF THE CASE

1. *The Parties.*

Central States, Southeast and Southwest Areas Pension Fund ("Central States" or "Pension Fund")[2] is a multiemployer pension benefit plan as defined in Section 3(2)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA") (as amended), 29 U.S.C. § 1002(2)(A).[3] A multiemployer plan is one to which more than one employer is required to make contributions pursuant to collective bargaining agreements with one or more local unions. 29 U.S.C. § 1002(37)(A). All contributions and earnings thereon are used to provide pension benefits for participants and beneficiaries and to defray reasonable administrative expenses. 29 U.S.C. § 1104(a)(1)(A). Central States was established pursuant to a trust agreement that provides that Central States shall be administered by a Board of Trustees. The Board of Trustees consists of four trustees appointed by

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[2] As Central States is a multiemployer benefit plan there are no parent or subsidiary corporations.

[3] Citations to ERISA will hereinafter be made to its codification at 29 U.S.C. § 1001 *et seq.*

labor organizations of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("IBT") and four trustees appointed by employer associations in accordance with the Taft-Hartley Act. The trust agreement grants the Trustees the power to create a pension plan document and to amend the pension plan document and the trust agreement. (*See* R. 36: Priede Affidavit, Exhibit A at Article VII, Sections 1 and 3, Artitcle X.)

Whitworth Brothers Storage Company ("Whitworth Brothers") was an employer which participated in the Pension Fund and made contributions to the Pension Fund pursuant to the terms of collective bargaining agreements between itself and a local union affiliated with the IBT.

2. *Background Facts and Proceedings below.*

Many of the facts pertinent to this response are accurately stated in the opinion of the Sixth Circuit. *See* Petitioner's Appendix at pp. 2a-65a.[4] Facts appearing in the record below, but not in the Sixth Circuit's opinion, are parenthetically cited as "(R. —)".

A. Whitworth Brothers' Refund Claim, and the Pension Fund Trust Agreement Provision Related to Refunds.

This case concerns the effect of a provision in the Pension Fund's trust agreement which requires employers who make refund claims for mistaken contribution payments to do so within one year of the time from which the mistaken payment was made.

Whitworth Brothers began participating in the Central States Pension Fund in June 1964. (R. 36: Priede Affidavit, ¶ 6.) It submitted contributions on behalf of William Whitworth from June 1964 through March 1980,

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[4] Citations to Petitioner's Appendix will hereinafter be made as "Pet. App. at p. ——".

and on behalf of Ernest Whitworth from June 1964 through June 1981. (R. 36: Priede Affidavit, ¶ 6.) It also submitted contributions on behalf of other individuals. On November 10, 1980, Whitworth Brothers made a demand to Central States for a refund of certain contributions mistakenly made on behalf of William Whitworth over a period of 15 years. At the time this demand was made, the provision of the Central States Pension Fund Trust Agreement which governed employer refunds, Article XIV, Section 1, provided:

> In no event shall Employers, directly or indirectly, receive any refund on contributions made by them to the Trust except in case of bona fide mistake, and as to which contributions are returned within *one year* after payment of the contributions . . .

(*See* R. 36: Priede Affidavit, Exhibit A.)

This Trust Agreement provision was based on ERISA's refund rule, 29 U.S.C. § 1103(c)(2)(A), which, prior to September 26, 1980, permitted a pension plan to return only contributions made by an employer under a mistake of fact within one year after payment of the contributions:

> In the case of a contribution, which is made by an employer by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution.

Paragraph (1) provided that "the assets of a plan shall never inure to the benefit of any employer." Congress amended this provision on September 26, 1980 to read, in pertinent part, as follows:

> (2)(A) In the case of a contribution . . .
>
> (ii) . . . made by an employer to a multiemployer plan by a mistake of fact or law . . ., paragraph (1) shall not prohibit the return of such contribution or payment to the employer within six months after

> the plan administrator determines that the contribution was made by such a mistake.

In December 1980, the Central States Trustees amended the refund rule found in Article XIV, Section 1 of the Trust Agreement, retroactive to September 26, 1980, to liberalize somewhat the refund provision in the wake of the ERISA amendment which made such liberalization possible. The amended trust agreement, in relevant part, provides:

> In no event shall the Employers, directly or indirectly, receive any refund on contributions made by them to the Trust, except a refund of contributions made by a mistake of fact or law (other than a mistake about plan qualification or tax-exempt status pursuant to the Internal Revenue Code) as determined by the Trustees if application therefor is received within one year after payment of the contributions.

(R. 36: Priede Affidavit, Exhibit B.)

In adopting this change the Trustees recognized:

> (a) the need to deter, and to protect the Fund from, employer payment of contributions on behalf of employees or other persons *ineligible* to become participants and beneficiaries of the Fund, by application of reasonable standards for entitlement to employer contribution refunds; and (b) the need to deter, and to protect the Fund from, unjustified and detrimental delay by employers in seeking employer contribution refunds, by application of *reasonable time limits* upon request for such refunds . . ."

(R. 36: Priede Affidavit, Exhibit B [emphasis in original].)

B. The Proceedings Below.

On November 10, 1980, Whitworth Brothers made its demand for a refund. The request for a refund of pension contributions made on William Whitworth's behalf

from June 1964 through November 10, 1979 was denied, but a refund was approved in accordance with Article XIV, Section 1 of the Trust Agreement for the period of November 11, 1979 (one year prior to the request) through March 1, 1980 (the last day of contributions made on William Whitworth's behalf). Prior to filing a lawsuit, Whitworth Brothers did not seek a refund of any contributions made on behalf of Ernest Whitworth.

In September 1983, Whitworth Brothers sued Central States, in a three-count complaint seeking a refund of contributions made to the Central States Pension Fund on behalf of William and Ernest Whitworth. Specifically, Count I of the complaint alleged a right, pursuant to 29 U.S.C. § 1103(c)(2)(A)(ii), to recover contributions made by Whitworth Brothers to the Pension Fund on behalf of William Whitworth and Ernest Whitworth *after* the effective date of ERISA (i.e., after January 1, 1975); Count II alleged a pendent state-law claim for restitution of Whitworth Brothers' contributions for William Whitworth and Ernest Whitworth *prior* to the effective date of ERISA (i.e., prior to January 1, 1975); and Count III sought a declaratory judgment pursuant to 28 U.S.C. § 2201 that Ernest Whitworth is not covered by the collective bargaining agreement providing for contributions to the Pension Fund, that Whitworth Brothers is entitled to restitution plus interest of the payments made on Ernest Whitworth's behalf, and that Central States is not entitled to recover unpaid contributions. Jurisdiction was claimed pursuant to ERISA and 28 U.S.C. § 1331.

In January 1985, the district court entered an order dismissing the ERISA counts of the Complaint for lack of jurisdiction over the subject matter because ERISA did not specifically authorize employers to file ERISA actions, and dismissing the pendent state law claim pursuant to its discretionary authority.

Whitworth Brothers appealed, and the United States Court of Appeals for the Sixth Circuit reversed and remanded. *Whitworth Brothers Storage Co. v. Central*

States, Southeast and Southwest Areas Pension Fund, 794 F.2d 221 (6th Cir.), *cert. denied*, 479 U.S. 1007, 107 S.Ct. 645, 93 L.Ed.2d 701 (1986) (*"Whitworth I"*). In its opinion, the Sixth Circuit considered "whether the district court had jurisdiction of such a claim [by an employer for restitution of contributions made, allegedly by mistake, to an employee benefit plan] based on: (1) the express actions recognized in ERISA; (2) an action implied from the terms of the statute; or (3) an action arising under federal common law." 794 F.2d at 224. The Sixth Circuit answered the first two of these questions in the negative, holding that "section 502 [29 U.S.C. § 1132] is an exclusive grant of jurisdiction, that ERISA does not expressly provide for an action by an employer against a fund for a refund of contributions," and that an employer has no "implied right of action pursuant to section 403 [29 U.S.C. § 1103]." *Id.* at 228, 233. However, the Sixth Circuit characterized Whitworth Brothers' restitution claim as a "contract claim", found that such a claim is governed by federal common law and held that Whitworth Brothers' action for restitution "arises under" federal law for the jurisdictional purposes of 28 U.S.C. § 1331. *Id.* at 236. The Sixth Circuit held the district court erred in concluding that it had no jurisdiction over the case. *Id.* at 236. In so holding, however, the Sixth Circuit made it clear that Whitworth Brothers' federal common law claim was expressly limited by the terms of ERISA set out in 29 U.S.C. § 1103(c)(2)(A), and by the terms of the agreement between the parties. *Id.* at 236, n.24 (The Sixth Circuit, as do a number of the other courts of appeals, refers to the written documents governing the plan [the plan document and where applicable, the collective bargaining agreement and trust agreement or declaration of trust] as "agreements," "contracts," or "contractual documents." *See Whitworth I*, 794 F.2d at 236 n.24 ("agreement"); *Crews v. Central States, Southeast and Southwest Areas Pension Fund*, 788 F.2d 332, 336 (6th Cir. 1986) ("the contract in this case, the Trust

Agreement . . ."). Central States' petition to this Court for a writ of certiorari was denied.[5]

On remand, Central States moved for Summary Judgment. The district court granted Central States' motion as to counts one and two of the complaint, holding that: (1) since the Board of Trustees of Central States acted in accordance with the written trust agreement, the Trustees' decision as to Whitworth Brothers' claim for a refund was not arbitrary or capricious (Count I); and (2) Whitworth Brothers' claim for restitution of contributions paid to Central States prior to January 1, 1975 (when ERISA became effective) was barred by the contract of the parties (the trust agreement) which limited claims for refunds, as described above (Count II). Because of the district court's ruling on counts one and two, there remained no issue of fact on count three; therefore, judgment on count three was for Whitworth Brothers. Whitworth Brothers appealed again.

The Sixth Circuit issued an opinion on January 11, 1993, in which it affirmed in part and reversed in part the judgment of the district court, and remanded for further proceedings; specifically: (1) the district court's denial of a refund for all pre-ERISA contributions made prior to January 1, 1975, was affirmed on the basis of the trust agreement provision in effect during that period; (2) the dismissal of the complaint in regard to post-ERISA contributions made on behalf of Ernest Whitworth after January 1, 1975, was affirmed because he had not requested a refund from the Pension Fund before filing suit; (3) the grant of summary judgment in regard to the denial of a refund of post-ERISA contributions made on behalf of William Whitworth after January 1, 1975, was

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[5] In its petition, Central States asked this Court to resolve the direct conflict between the Sixth Circuit in *Whitworth I* and the Eleventh Circuit in *Dime Coal Company, Inc. v. Combs*, 796 F.2d 394 (11th Cir. 1986), which held that a federal common law cause of action of restitution was not available to employers which made mistaken contributions to employee benefit plans.

reversed and remanded for a hearing on the validity of the trust agreement provision in effect after the 1980 amendment; and (4) the district court's decision that no interest is due on whatever amounts are refunded (pursuant to subparagraph 3 above) was affirmed. Pet. App. at pp. 63a-65a. Whitworth Brothers' petition for Rehearing was denied on February 16, 1993. Pet. App. at pp. 68a-69a.

Whitworth Brothers' petition for a writ of certiorari to this Court was served on Central States on May 19, 1993. On June 7, 1993, this Court allowed Central States until July 19, 1993 to file this response.

SUMMARY OF ARGUMENT

The Petitioner, Whitworth Brothers Storage Company ("Whitworth Brothers") asks this Court to resolve a split in the Circuits concerning the application of 29 U.S.C. § 1144 [6] to cases which involve actions by ERISA plan administrators after ERISA's effective date as well as conduct prior to ERISA's effective date. The Sixth Circuit in this case has upheld the district court's entry of summary judgment against Whitworth Brothers on Count II [7] of its Complaint, a state law claim for restitution.[8]

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[6] ERISA's preemption and choice of law provision. *See Menhorn v. Firestone Tire and Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984) (dissent).

[7] Count One was a claim "for recovery of Plaintiff's contributions to Central States on and after January 1, 1975 (when ERISA became effective) pursuant to 29 U.S.C. § 1103(c)(2)(A)(ii)." Complaint, ¶ 9.

[8] Count II sought "restitution of Plaintiff's contributions to Central States prior to January 1, 1975 (when ERISA became effective)" (Complaint, ¶ 18). This claim was brought pursuant to "pendent jurisdiction" over "State [law] claims [which] derive from a common nucleus of operative facts" (Complaint, ¶ 17).

In doing so, Whitworth Brothers argues, the Sixth Circuit implicitly [9] relied upon the narrow view of the scope of ERISA's preemption provision it had adopted in *Stevens v. Employer-Teamster's Joint Council*, 979 F.2d 444, 451 (6th Cir. 1992) pursuant to which (1) state law would remain in place to provide the rule of decision for cases involving post-ERISA plan administrator actions and pre-ERISA operative facts, and (2) ERISA would therefore provide no jurisdictional basis for such a case.

Central States believes that resolution of the conflict between the narrow view of the scope of ERISA preemption and the broad view is important, and it agrees that this Court should resolve this issue, and indeed it agrees that a broad view of the scope of ERISA preemption is appropriate, but submits that the correct resolution of the "Question Presented" as formulated by Whitworth Brothers actually involves two other issues, including one of much greater ongoing importance:

> Must the written documents governing the plan (in addition to the plan administrator's application of the plan's provisions) withstand judicial scrutiny under a "reasonableness" standard? Specifically, must a trust agreement provision limiting the period for which an employer may recover contributions paid to the plan by mistake be determined to be "arbi-

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[9] In *Whitworth II*, the Sixth Circuit did not expressly address the scope of ERISA's preemption provision. Whitworth Brothers correctly points out that the court treated the issue of the recoverability of pre-ERISA contributions as a state law issue (Whitworth Brothers' Petition, p. 17). Although the court may have done this because Whitworth Brothers' Complaint based its demand for pre-ERISA contributions only on state law, this treatment also corresponds to a narrow view of preemption, which might hold that the operative facts concerning the plaintiff's claim for pre-ERISA contributions (the contributions themselves and the contractual provision governing refunds at that time) were "acts" which occurred prior to January 1, 1975 and to which, therefore, ERISA's preemption provision would not apply.

trary and capricious" and set aside in favor of an equitable rule created by the Court?

This is the issue for which Central States has filed a Cross-Petition for Writ of Certiorari in this case, and the answer to this question should govern the result on both the Count (II) regarding which Whitworth Brothers has petitioned for certiorrari, and the Count (I) regarding which Central States has cross-petitioned. The Whitworth Brothers Petition itself presents this question, in the sense that it does not simply ask this Court to decide whether ERISA (and whatever common law exists under ERISA) applies to a post-ERISA plan administrator decision based in part on pre-ERISA conduct, but rather it asks this Court to confirm that a particular cause of action exists [10] and to decide that the rule of decision for that cause of action should not accept the "contractual provision in effect" (*Whitworth II*, *supra*, Pet. App. at p. 25a) as the limit to the amount of contributions which it could recover under that cause of action:

> "*Does* the recognized federal common law *action for restitution* of an employer's post-ERISA mistaken pension contributions also *extend to pre-ERISA contributions*? In determining that question, . . . should ERISA preemption be used as a basis to deny any remedy [11] of restitution for unjust enrichment under federal or state law?"

Whitworth Brothers' Petition for Certiorari, p. i.

Second, Whitworth Brothers argues that it is entitled to interest on any post-ERISA contributions refunded be-

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[10] This is the other issue which the Whitworth Brothers' "Question Presented" involves: does a federal common law cause of action for restitution exist at all?

[11] The Sixth Circuit's decision did not purport to completely deny Whitworth Brothers any remedy for pre-ERISA contributions; it simply held that Whitworth Brothers' remedy would be limited by the refund provision of the Central States Trust Agreement, at least for pre-ERISA contributions.

cause its federal common law restitution claim is based on principles of equity. No split in the Circuits exists on this issue. Rather, in support of its argument Whitworth Brothers simply cites recent decisions of this Court which it argues to be inconsistent with the Sixth Circuit's decision. *U.S. v. Texas,* —— U.S. ——, 113 S. Ct. 1631, 123 L.Ed.2d 245 (1993) and *Franklin v. Gwinnett County Public Schools,* —— U.S. ——, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). Central States submits that these decisions are inapposite.

Third, Whitworth Brothers argues that, under the facts of this case, the Sixth Circuit incorrectly held that the claim for a refund of contributions paid on behalf of Ernest Whitworth should have been dismissed for Whitworth Brothers' failure to exhaust its administrative remedies. Central States submits that the appellate court correctly decided the exhaustion issue and that it does not raise a question of sufficient importance for this Court to review.

Lastly, Whitworth Brothers argues that the appellate court incorrectly relied upon evidence that was not in the record. Central States submits that the appellate court properly referred to certain background facts in writing its decision, and that since suggestion has not been made that the facts were not correct, such reference was harmless in any event. The issue is also not of sufficient importance to justify review by this Court.

ARGUMENT

INTRODUCTION

In the interest of clarity, it should be noted that Whitworth Brothers' first "Question Presented" consists of three issues. Whitworth Brothers devotes most of its brief to the split among the Circuits on the meaning of ERISA's pre-emption provision as applied to claims involving a post-ERISA decision of a plan administrator which is based at least in part on pre-ERISA conduct. This issue has indeed divided the Circuits and is an important issue, but the first "Question Presented" in the Whitworth Brothers' Petition actually includes two other issues, one of which is of even greater importance. For analytical purposes, these questions should be distinguished and addressed separately.

Whitworth Brothers has formulated its first Question Presented as follows:

> Does the recognized federal common law action for restitution of an employer's post-ERISA mistaken pension contribution also extend to such pre-ERISA contributions? In determining that question, in the face of a conflict among seven circuit courts and this Court's holding in *Franklin v. Gwinnett Country Public Schools*, 112 S.Ct. 1028 (1992), should ERISA pre-emption be used as a basis to deny any remedy of restitution for unjust enrichment under federal or state law?

The issue which Whitworth Brothers Petition discusses at greatest length is whether ERISA (and federal common law created pursuant to ERISA) applies [12] to a case

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[12] The Courts have discovered three separate inquiries in the issue of whether ERISA applies. First, does ERISA provide federal courts with jurisdiction to hear such a case? Second, does ERISA pre-empt state law which might otherwise provide the rule of decision for such a case? Third, what rule of decision is required

involving a post-ERISA plan administrator decision based upon at least some pre-ERISA conduct. This is the first issue raised by Whitworth Brothers' "Question Presented."

The "Question Presented" quoted above, however, asks this Court to declare, not just that ERISA applies, but that a particular federal common law cause of action developed by some of the Circuits (an employer action for restitution) applies to such a case. The question of whether this particular cause of action should be applied in such a case involves a second issue: whether such a cause of action is appropriate at all, an issue upon which the Circuits are also divided. Certiorari was requested on this issue by Central States and denied by this Court earlier in this case. *Central States v. Whitworth Brothers, cert. denied*, 479 U.S. 1009, 107 S.Ct. 645, 93 L.Ed.2d 701 (1986).

If the Court decides that ERISA applies to post-ERISA denials of pre-ERISA contributions, and that a federal common law cause of action exists to sue after a request for a refund of such contributions is denied, the third issue raised by Petitioner's "Question Presented" will arise: is the remedy available under such a cause of action limited by the written documents governing the plan? [13]

The last issue is the most important of the issues involved in the "Question Presented" as framed by Whitworth Brothers, although the Courts of Appeal are split as to all three of these issues. Because the issue of whether a federal common law cause of action to sue

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by ERISA (in the event it preempts state law): federal common law created independent of state law, or previously applicable state law incorporated into federal common law?

[13] Whitworth Brothers argues that such a limitation amounts to no remedy at all (Petition, p. 17). In fact, this is not correct: a remedy is provided; it is simply limited to enforcing the contractual provisions which govern the question.

for a refund of contributions paid by mistake has been the subject of an earlier petition for certiorari, it will not be separately discussed here, except to note the conflict among the Circuits on the issue.[14] Because the last issue is not presented with the clarity it deserves in the Whitworth certiorari petition, and because the issue also affects the Sixth Circuit's decision on Count I (for which Whitworth Brothers did not seek certiorari) Central States has filed a separate Cross-Petition as to that issue. Therefore, only a brief reference will be made to that issue in this brief, but the Court is requested to review the Cross-Petition for discussion of that issue. Thus, the only issue from the "Question Presented" which will be specifically addressed in this brief is the first issue.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE QUESTION OF WHETHER ERISA (OR FEDERAL COMMON LAW CREATED PURSUANT TO ERISA) PROVIDES JURISDICTION AND A CAUSE OF ACTION (AND IF SO, WHAT THE RULE OF DECISION SHOULD BE) IN CASES INVOLVING BOTH A PLAN ADMINISTRATOR'S POST-ERISA ACTION AND SOME PRE-ERISA CONDUCT.

A. Courts of Appeals Are Split on Whether ERISA Provides Jurisdiction and a Cause of Action (and If So, What the Rule of Decision Should Be) In Cases Involving Both a Post-ERISA Plan Administrator Action and Some Pre-ERISA Conduct.

Whitworth Brothers has correctly quoted the Sixth Circuit's description of the split which has arisen over the meaning of the exception to ERISA's preemption provision which was created for pre-ERISA claims and conduct. 29 U.S.C. § 1144(b)(1). Petition at pp. 14-15.

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[14] *See, e.g., Dime Coal Company, Inc. v. Combs*, 796 F.2d 394 (11th Cir. 1986) (no federal common law cause of action exists) and *Whitworth I*, 794 F.2d 221 (6th Cir. 1986) (federal common law cause of action exists).

In cases involving a post-ERISA plan administrator action (such as a denial of benefits or, in this case, a denial of a refund for mistaken contributions) which is based in part on some pre-ERISA conduct, the courts are divided as to whether ERISA provides federal court jurisdiction to review a complaint regarding such plan administrator action and, if so, what rule of decision should be applied. As the Sixth Circuit noted, the Third, Fourth and Fifth Circuits have taken a broad view of ERISA pre-emption and jurisdiction, and the First, Second, and Ninth Circuits have taken a narrow view. *Stevens v. Employer-Teamsters Joint Council*, 979 F.2d 444, 451 (6th Cir. 1992). The Sixth Circuit has joined the narrow view, concluding (1) that "ERISA jurisdiction does not lie if a pension plan's denial of benefits was based on pre-1975 acts or omissions," *Id.* at 453, and (2) that ERISA preemption of state law does not extend to such cases. *Id.* at 453. In so holding, the Sixth Circuit rejected the specific conclusion of the Third and Fourth Circuits that "the act of denying a pension post-ERISA will invariably involve a 'contemporaneous construction of the plan's provision' " to which ERISA applies. *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir. 1989), *quoting Tanzillo v. Local Union 617*, 769 F.2d 140, 144 (3rd Cir. 1985). *Stevens*, 979 F.2d at 451-452.

This view has the effect, *inter alia*, of denying a federal forum to a participant who has had a pension denied after the effective date of ERISA, despite ERISA's specific provision that "a civil action may be brought . . . by a participant . . . to recover benefits due him under the terms of his plan. . . ." 29 U.S.C. § 1132(a)(1)(B).

B. This Case Presents an Opportunity for This Court To Resolve the Split.

Although the Sixth Circuit's detailed discussion of the split appears in the *Stevens* case quoted above, Petitioner

argues that this case presents an appropriate opportunity for this Court to resolve the split.

While the Sixth Circuit did not address the split in this case,[15] the facts of this case certainly present an example of a post-ERISA plan administrator decision based in part on pre-ERISA conduct. The denial of Whitworth Brothers' refund request occurred in July 1981, long after the effective date of ERISA. *Cf.* 29 U.S.C. §§ 1114, 1144. The contributions for which the refund was sought pursuant to Count II of the Complaint, on the other hand, were all made prior to the effective date of ERISA. *Id.*; Complaint, Count II.

C. This Split Presents Important Questions for Resolution by This Court.

ERISA plans will continue to be presented with benefit claims based in part on pre-ERISA conduct, particularly pension claims which, although decided post-ERISA, will often involve conduct which occurred prior to 1975. In addition, as this case demonstrates, plans will continue to be presented with refund requests (often triggered by pension denials) based upon conduct which occurred prior to ERISA. Particularly in view of the importance Congress attached to the need to ensure that benefit plans would be administered in accordance with the governing plan documents so that plans and their participants benefit from the certainty and predictability attached to such writen terms, certiorari should be granted in this case. This case presents the interest plans have in the uniformity ERISA provides in areas other than benefit cases, an interest not represented in *Rodriguez*, a benefits case where Justice White expressed his view that certiorari should have been granted to resolve the split between the

[15] The Sixth Circuit may not have discussed the split in this case because Whitworth Brothers' complaint had based its claim for recovery of pre-ERISA contributions solely on state law, not ERISA.

broad and narrow views of preemption. *MEBA Pension Trust v. Rodriguez,* No. 89-206, *cert. denied,* 493 U.S. 872, 110 S. Ct. 202, 107 L.Ed.2d 155 (1989); *McMonagle v. Northeast Women's Center,* 493 U.S. 90, 110 S. Ct. 261, 263, 107 L.Ed.2d 210 (1989) (White, dissenting). *See* Section I, E, *infra.*

D. This Court Should Grant Certiorari to Establish That ERISA Provides Jurisdiction To Consider Whether Post-ERISA Actions by Plan Administrators May Be Challenged.

This case demonstrates how participants, employers, and plans all have an interest in the predictability which ERISA was designed to foster and only federal forums can effectively provide. Participants seeking to challenge post-ERISA plan administrator actions desire a federal forum. Employers such as Whitworth Brothers seek the same. Plans, however, also benefit from a rule that ERISA provides jurisdiction for such cases because they benefit from the predictability and certainty that ERISA was designed to foster. Thus, Whitworth Brothers argues that federal courts have jurisdiction to consider its complaint regarding the Pension Fund's denial of a refund of its pre-ERISA contributions, and the Pension Fund agrees. The parties part company, however, on the question of whether a cause of action exists and what the rule of decision should be.

Whitworth Brothers appears to argue at various points that state law should apply (Petition at p. 16, justifying the narrow view of preemption), that federal common law created pursuant ot ERISA should apply (*Id.* at p. 18), and that the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 141 *et seq.*, should apply (*Id.*).

Central States believes that ERISA provides federal court jurisdiction to consider whether a challenge to an administrator's post-ERISA act may be brought, and that

if a cause of action exists,[16] the question to be resolved is limited to whether the administrator's application of the documents governing the plan may be overturned. *See Firestone, supra,* (standard of review). What a federal court is not empowered to do is review the written provisions themselves under a "reasonableness" standard, since the creation and amendment of an ERISA plan are plan sponsor actions, not plan administrator actions, and ERISA does not permit review of the former. *See* Section I, E, below.

E. This Court Should Grant Certiorari in This Case Because It Presents an Even More Important Split: the Split Concerning Whether, Under ERISA, Courts May Review the Documents Governing Plans for "Reasonableness" (the Issue This Court Invited the Second Circuit To Address on Remand in *Local 144 Nursing Home Pension Fund v. Demisay,* 113 S.Ct. 2252 (1993)).

If this Court agrees that ERISA creates jurisdiction and the rule of decision in this case, it will then reach the issue of even greater importance: whether the plan administrator's post-ERISA decision may be reviewed only for compliance with the documents governing the plan, or whether the provisions in these written documents may themselves be invalidated under a general review for "reasonableness." This issue and its importance is dis-

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[16] A cause of action clearly exists, in Central State's opinion, for a post-ERISA denial of benefits, because such a decision should always involve an application of the plan document to a particular case and 29 U.S.C. § 1132(a)(1)(B) provides that a participant may sue for review of such a decision. *Cf. Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). Central States has previously sought certiorari in this case for the Court to consider whether a federal common law cause of action should be created to enable employers to sue to recover contributions mistakenly paid to an ERISA plan. *See Central States v. Whitworth Brothers, cert. denied,* 479 U.S. 1009, 107 S.Ct. 645, 93 L.Ed.2d 701 (1986).

cussed fully in Central States' Cross-Petition. Central States here wishes only to refer the Court to its cross-petition, and to note that the issue is the same issue, but now presented under ERISA, which this Court addressed and resolved under the LMRA in *Local 144 Nursing Home v. Demisay,* —— U.S. ——, 113 S.Ct. 2252 1993). The ERISA issue, in fact, is one which this Court specifically invited (but did not require) the Second Circuit to address on remand in *Demisay.*

II. THE DECISION BY THE COURT BELOW THAT INTEREST IS NOT AVAILABLE ON ANY REFUND MADE PURSUANT TO WHITWORTH BROTHERS' RESTITUTION CLAIM FULLY COMPORTS WITH ERISA'S STATUTORY BAR AND THE OPINIONS OF THE OTHER CIRCUIT COURTS WHICH HAVE ADDRESSED THE ISSUE.

This particular issue neither involves an important question of federal law nor addresses a conflict among the circuits. Indeed, courts which have addressed the issue are unanimous: interest is not available on an employer's common law action for restitution of contributions mistakenly made to an employee benefit fund. *Whitworth II,* Pet. App. at p. 63a; *Kwatcher v. Massachusetts Service Emp. Pension Fund,* 879 F.2d 957, 967 (1st Cir. 1989); *Plucinski v. I.A.M. National Pension Fund,* 875 F.2d 1052, 1058 fn. 6 (3rd Cir. 1989); *Airco Industrial Gases, Inc. v. Teamsters Health and Welfare Pension Fund,* 850 F.2d 1028, 1037 (3rd Cir. 1988); *Dumac Forestry Services, Inc. v. Int. Broth. of Elec. Workers,* 814 F.2d 79, 83 (2d Cir. 1987); *Peckham v. Board of Trustees of International Brotherhood and Allied Trades Union,* 724 F.2d 100, 101 (10th Cir. 1983); *Plumbers and Steamfitters Local 152 v. Bland,* 745 F. Supp. 1172, 1175 (N.D. W.V. 1990).

Furthermore, the clear language of ERISA prevents courts from exercising their equitable powers to award interest on refund claims. *Airco Industrial Gases, Inc.*

v. Teamsters Health and Welfare Pension Fund, 850 F.2d at 1037. The anti-inurement provision of ERISA, 29 U.S.C. § 1103(c)(1), provides that:

> "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

Congress created a few specific exceptions to the bar, including the one at issue in this case:

> "In the case of a contribution . . ., if such contribution . . . is made by an employer to a multiemployer plan by a mistake of fact or law . . . paragraph (1) [*the anti-inurement provision*] *shall not prohibit the return of such contribution or payment* to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake."

29 U.S.C. § 1103(c)(2)(A)(ii) (emphasis added).

Thus, Congress has prohibited plans from paying out any of their assets to employers, and the only exception relevant to the payment of mistaken contributions is the lifting of the prohibition to permit a plan to refund the contributions themselves. Interest, however, is something different from contributions, and thus, as the courts have held, the prohibition remains in place against plans paying out any assets to employers for interest:

> [i]nterest, which is the accrued value of money over time, is not a part of the overpayment but an incident of it. The amount of interest a court might award comes directly from the plan's assets and will deprive participants and beneficiaries of its use . . . The decision to order restitution is an effort at correcting an injustice, but payment of interest means an amount greater than that paid in as excess contributions may be awarded while the fund has encountered certain [administrative] costs related to the

> overpayments. An award of interest, therefore, could cost the fund more than if the excess contribution had never been made.

Airco, 850 F.2d at 1037.

Whitworth Brothers relies on two decisions of this Court in support of its argument that interest should be available as part of its restitution claim on post-ERISA contributions. *U.S. v. Texas*, —— U.S. ——, 113 S.Ct. 1631, 123 L.Ed.2d 245 (1993) and *Franklin v. Gwinnett County Public Schools*, —— U.S. ——, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). *Franklin* simply held that, in the absence of a clear direction to the contrary by Congress, federal courts have the power to award any appropriate relief in a cause of action brought pursuant to a federal statute. *Franklin*, —— U.S. ——, 112 S.Ct. at 1035. *Franklin* is inapplicable here because Congress has explicitly barred ERISA plans from paying over any of their assets to employers, except for refunds of mistaken contributions themselves.

U.S. v. Texas is also inapposite because it invoked a principle which does not apply where Congress has indicated a contrary purpose, as it has here. *Texas*, —— U.S. ——, 113 S.Ct. at 1634. The principle articulated in the *Texas* case is that prejudgment interest is payable in cases involving debts owed to the United States and arising out of a contract. *Id.* But this common law principle, even if it could be asserted in this case,[17] was expressly noted by this Court to be inapplicable "when a statutory purpose to the contrary is evident." *Id.*, 113 S.Ct. at 1634, *quoting Astoria Federal Savings & Loan v. Solimino*, —— U.S. ——, 111 S.Ct. 2166, 2170, 115 L.Ed.2d 96 (1991).

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[17] The asserted refund obligation of Central States in this case was not based upon a contract; in fact, it would expressly conflict with the refund provision in the Central States Trust Agreement.

Thus, because all of the Circuits which have created a cause of action for an employer to sue for a refund of mistakenly paid contributions have held that interest is not recoverable, and because the holding is not in conflict with any of this Court's decisions, certiorari should be denied as to this issue.

III. THE DECISION OF THE COURT OF APPEALS THAT WHITWORTH BROTHERS' CLAIM FOR A REFUND OF POST-ERISA CONTRIBUTIONS MADE ON BEHALF OF ERNEST WHITWORTH SHOULD BE DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES IS CORRECT AND DOES NOT RAISE A QUESTION OF FEDERAL IMPORTANCE SUFFICIENT TO WARRANT THIS COURT'S REVIEW.

The primary reason for denying certiorari on the question of whether the Sixth Circuit correctly upheld the dismissal of the claim for a refund as to Ernest Whitworth's contributions on the basis of a failure to exhaust administrative remedies is that it is a fact-specific issue not significant enough for the Court's review. In addition, however, the Sixth Circuit's decision was correct. Whitworth Brothers could have requested a refund of contributions made on behalf of Ernest Whitworth at (or near) the time it made its request as to William Whitworth, but it elected not to do so. Whitworth Brothers now argues that it would have been futile to exhaust its remedies by making a request for a refund of contributions made on behalf of Ernest prior to initiating this lawsuit because Central States had already denied its request for a refund of contributions made on behalf of William. There is no logic to this argument; the trustees' decision as to William clearly is not *res judicata* as to Ernest (or anyone else for that matter).

Moreover, William Whitworth's initial request to the Pension Fund was for a pension. Only after his pension

request was denied by Central States' trustees did Whitworth Brothers request a refund of the contributions made on William's behalf. (*see* R. 36: Priede Aff., Exhibit H).[18] Had Ernest Whitworth applied for a pension, perhaps the trustees would have found that he was eligible and that the contributions paid on his behalf were not mistakenly paid at all. In sum, Whitworth Brothers cannot argue "futility" since it is not clear that the contributions paid on behalf of Ernest would have presented the same issue as contributions paid on behalf of William.

Whitworth Brothers advances four points in support of its argument: "[1] Central States had already made up its mind, [2] written its arbitrary refund policy, [3] refused to refund mistaken contributions, and [4] continued demanding unlawful contributions [on behalf of Ernest]." (*See* Whitworth Brothers' Petition for Writ of Certiorari at p. 33.) None of these points are meritorious or sufficiently important to warrant this Court's review.

First, Central States' decision was limited to Whitworth Brothers' request for a refund of contributions made on behalf of William, *not* Ernest. Second, Central States' refund provision has not been found to be arbitrary. Third, the trustees' decision denying a refund was, again, limited to Whitworth Brothers' request as to William. Finally, the Sixth Circuit noted that since Central States works on the basis of a self-reporting system, it did not have any basis for discontinuing billings to Whitworth Brothers for contributions on behalf of Ernest just because a refund was denied on William.

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[18] William Whitworth's pension request was denied by the trustees on the basis that William had an ownership interest in Whitworth Brothers, functioned in a management capacity since September 20, 1938, and had been paid as an owner (rather than pursuant to the wage rates set forth in the applicable collective bargaining agreements). (R. 36: Priede Aff., Exhibits G and H).

In light of ERISA's mandate that benefit plans include an appeals procedure,[19] the courts have consistently required that claimants exhaust these administrative procedures prior to bringing litigation seeking benefits. *Baxter v. C.A. Muer Corp.*, 941 F.2d 451 (6th Cir. 1991); *Makar v. Health Care Corp. of Mid-Atlantic (Care First)*, 872 F.2d 80, 82 (4th Cir. 1989); *Mason v. Continental Group Incorporated*, 763 F.2d 1219, 1227 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986); *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182 (3rd Cir. 1984); *Kross v. Western Electric Company, Inc.*, 701 F.2d 1238 (7th Cir. 1983); *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980). Failure to exhaust these remedies is grounds for an award of summary judgment. *Merritt v. Confederation Life Insurance Company*, 881 F.2d 1034 (11th Cir. 1989).

In sum, the court of appeals correctly ruled on summary judgment that Whitworth Brothers' claim for a refund of contributions made on behalf of Ernest Whitworth should be dismissed for failure to exhaust administrative remedies. Furthermore, this issue does not involve a question of national importance and, therefore, does not warrant the court's review.

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[19] 29 U.S.C. § 1133 provides:

> Claims Procedure:
>
> In accordance with regulations of the Secretary, every employee benefit plan shall—
>
> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
>
> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

IV. BECAUSE THE COURT OF APPEALS' REFERENCE TO THREE INFORMATIONAL FACTS NEITHER PREJUDICED NOR AFFECTED THE SUBSTANTIAL RIGHTS OF WHITWORTH BROTHERS THERE EXISTS NO BASIS FOR DISTURBING THE DECISIONS BELOW. THIS ISSUE IS NOT IMPORTANT ENOUGH TO WARRANT THIS COURTS REVIEW.

The primary reason to deny certiorari on the question of whether the Sixth Circuit's reference to certain background facts was erroneous is the lack of significance of this issue beyond this case. In addition, however, the Sixth Circuit's reference was appropriate and, even if erroneous, harmless. Whitworth Brothers would have this Court believe that it was prejudiced because the court of appeals took judicial notice at oral argument of three informational facts.[20] Since none of these snip-

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[20] Whitworth Brothers argues the Court inappropriately utilized the following:

1. Central States is under a "self-reporting system" in which employer is responsible for notifying the fund of a change in employee status, [Whitworth Brothers] Appendix pages 12a-13a; contra page 5a (role of local union);
2. Employers contributed on behalf of "391,000 employee participants between 1964-1981; [Whitworth Brothers' Appendix page 59a];
3. It is "administratively impossible" to audit so many employers, [Whitworth Brothers' Appendix page 58a-59a].

(*See* Whitworth Brothers' Petition for a Writ of Certiorari at pp. 36-37.) It is noteworthy that these facts—none of which Whitworth Brothers ever asserted were incorrect—came to the Sixth Circuit's attention through Central States' Motion to Strike or, in the alternative, to Supplement the record on Appeal, filed in response to Whitworth Brothers' appellate brief which included numerous unsupported factual assertions. Although the Sixth Circuit denied Central States' Motion, its opinion recites some of Whitworth Brothers' non-record assertions (e.g., Whitworth Brothers purported contribution history on behalf of other individuals, Pet. App. at p. 5a-6a, n.3) as well as some points raised by Central States' Motion. Apparently the Sixth Circuit exercised discretion

pets of information to which the court alluded go to the merits of Whitworth Brothers' claim against Central States they are immaterial and non-esesntial. It cannot be clearer in reading the court's opinion that it merely referenced these facts to clarify the way Central States operates. It is hornbook law that courts have judicially noticed a great variety of facts about the practice of businesses. *See* Wright & Miller, *Federal Practice and Procedure*, Civil § 2410 n.28 (1971) and the numerous cases cited therein. That is all the court of appeals did. Moreover, there is no prejudice to Whitworth Brothers.

Whitworth Brothers erroneously asserts that the court of appeals "*affirmed* the judgment . . . on the basis of this non-record evidence." (*See* Whitworth Brothers' Petition for a Writ of Certiorari at p. 36) (emphasis added). This is clearly wrong. There is no indication in the court of appeals' decision that it affirmed judgment in favor of Central States based solely on any of these facts.

Even if the court's casual reference to these facts amounted to error (which it does not), such error is harmless. Rule 61 of the Federal Rules of Civil Procedure, which is equally applicable to appellate courts, *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984); *Gillis v Keystone Mutual Casualty Co.*, 172 F.2d 826 (6th Cir.), *cert. denied*, 338 U.S. 822, 70 S.Ct. 67, 94 L.Ed. 499 (1949), provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment

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in sifting through all these facts before using any of them for clearly background and informational purposes, and *not* in support of its legal opinion.

> or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

In addition, the harmless-error statute, 28 U.S.C. § 2111, which applies directly to appellate courts, incorporates the same principles as found in Rule 61; it provides:

> On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

At the heart of 28 U.S.C. § 2111 and Rule 61 is the proposition that the critical consideration is not the occurrence of the error, but its seriousness. *See e.g., Benna v. Reeder Flying Service, Inc.*, 578 F.2d 269, 271 (9th Cir. 1978) (Rule 61 directs courts to "disregard error which does not affect the substantial rights of the parties"). The litmus test is whether the party claiming error was thereby unjustly prejudiced. *U.S.* v. *Lane Motor Co.*, 199 F.2d 495 (10th Cir. 1952), *aff'd*, 344 U.S. 630, 73 S.Ct. 459, 97 L.Ed. 622 (1953); *Asbill v. Housing Authority of the Choctaw Nation of Oklahoma*, 726 F.2d 1499 (10th Cir. 1984) (applying both the statute and Rule 61). Whitworth Brothers has not given any specifics as to how it may have been prejudiced because, in fact, it was not. The background facts in question were not even asserted by Whitworth Brothers to be incorrect. Thus, even assuming, *arguendo*, there was error, the court's decision could not be disturbed because Whitworth Brothers was not prejudiced thereby.

There being no prejudice or error, there is no issue for this Court to decide.

CONCLUSION

For the foregoing reasons, Respondents submit that the petition for a writ of certiorari should be granted as to the first "Question Presented" by Petitioner as restated by Central States on p. i of this brief, but that the petition should be denied as to the remaining issues.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTORY PROVISIONS

Section 403 of ERISA, 29 U.S.C. § 1103

* * * *

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of Title 26 as in effect on January 1, 1991) the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter—

> (ii) if such contribution or payment is made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of Title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of Title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

* * * *

Section 514 of ERISA, 29 U.S.C. § 1144

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of

this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

* * * *

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of

either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

* * * *